(9)

No. 91-2086-CFX
Status: GRANTED

Title: Granite State Insurance Company, Petitioner
v.
Tandy Corporation

Docketed:
June 26, 1992

Court: United States Court of Appeals for the Fifth Circuit

Counsel for petitioner: Dimitry,Theodore G.

Counsel for respondent: Hill,Mark

Entry	Date	Note	Proceedings and Orders
1	Jun 26 1992	G	Petition for writ of certiorari filed.
2	Jul 27 1992		Brief of respondents Tandy Corp., et al. in opposition filed.
3	Jul 29 1992		DISTRIBUTED. September 28, 1992
4	Oct 5 1992		Petition GRANTED.
			**********
7	Nov 3 1992		Record filed.
		*	Partial proceedings United States Court of Appeals for the Fifth Circuit.
5	Nov 18 1992		Brief of petitioner filed.
6	Nov 18 1992		Joint appendix filed.
8	Dec 18 1992		Brief of respondents Tandy Corporation, et al. filed.
11	Dec 21 1992		Record filed.
		*	Certified proceedings United States District Court, Southern District of Texas.
9	Dec 28 1992		SET FOR ARGUMENT TUESDAY, FEBRUARY 23, 1993.(1st Case).
10	Jan 4 1993		CIRCULATED.
12	Jan 26 1993		Letter from Counsel received and distributed.
13	Feb 16 1993	D	Motion of the parties to defer oral argument filed.
14	Feb 19 1993		Motion of the parties to defer oral argument DENIED.
15	Feb 23 1993		ARGUED.

91-2086

NO.

IN THE

Supreme Court of The United States

OCTOBER TERM, 1991

GRANITE STATE INSURANCE COMPANY
Petitioner

v.

TANDY CORPORATION
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. In reviewing a decision by a district court to abstain from exercising clear federal jurisdiction in a declaratory judgment action, does a court of appeals determine the abstention issue de novo, or on the basis of whether the district court abused its discretion?

II. May a federal district court that clearly has jurisdiction over a declaratory judgment action in a case brought pursuant to federal law, abstain from exercising that jurisdiction in light of a later-filed action in a state court?

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No.

In The

Supreme Court of The United States

October Term, 1991

Granite State Insurance Company
Petitioner

v.

Tandy Corporation
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Granite State Insurance Company ("Granite State"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on March 30, 1992.

OPINIONS BELOW

The order of the Court of Appeals for the Fifth Circuit denying rehearing and rehearing en banc is not reported, and is reprinted in the appendix hereto, p. A-1, *infra*.

The opinion of the Court of Appeals for the Fifth Circuit is not reported and is reprinted in the appendix hereto, p. B-1, *infra*.

The opinion of the District Court for the Southern District of Texas is reported at 762 F. Supp. 156 (S.D. Tex. 1991), and is reprinted in the appendix hereto, p. C-1, *infra*.

LIST OF PARTIES

The parties to the proceedings below are Granite State Insurance Company,[1] Tandy Corporation and TC Electronics (Korea) Ltd.

The parallel litigation subsequently filed by Tandy in Texas state court, after amendment, involves the following parties:

1. Tandy Corporation
2. Granite State Insurance Company
3. AI Marine Adjusters, Inc.
4. Insurance Company of the State of Pennsylvania
5. American International Underwriters Corporation
6. Utica Mutual Insurance Company
7. Alexander & Alexander of Texas, Inc.

JURISDICTION

The decision of the Court of Appeals for the Fifth Circuit was rendered on March 30, 1992. A suggestion for rehearing en banc was filed on April 13, 1992, and denied on May 1, 1992. Jurisdiction over this petition is conferred by 28 U.S.C. § 1254.

This case was originally filed in the United States District Court for the Southern District of Texas. Federal maritime jurisdiction, 28 U.S.C. § 1333, and diversity jurisdiction, 28 U.S.C. § 1332, were asserted and relief was sought under the Declaratory Judgment Act, 28 U.S.C. § 2201(a). This case was appealed to the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1292(a)(3) and § 1291.

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[1] Granite State Insurance Company is wholly owned by the New Hampshire Insurance Company, which is wholly owned by NHIG Holding Corp., which is wholly owned by American International Group, Inc. Granite State has no subsidiaries.

STATUTE INVOLVED

28 U.S.C. § 2201(a). Declaratory Judgment Act.

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT OF THE CASE

This appeal arises out of a dispute between Tandy Corporation ("Tandy") and Granite State Insurance Company ("Granite State") over a $10 million claim asserted by Tandy as the assured under a Granite State marine cargo policy. Granite State filed this suit seeking a declaration that the insurance policy was void from its inception under federal maritime law, due to Tandy's material misrepresentations and nondisclosures in the procurement of the policy.[2]

On April 26, 1989, Tandy solicited a bid for worldwide marine cargo insurance[3] from Granite State. During policy negotiations, Tandy requested inclusion of an endorsement that extended coverage to inventory, work-in-progress and raw materials at Tandy's assembly plants and warehouses in

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[2] Under the maritime doctrine of *uberrimae fidei*, based on English law, both parties to a marine insurance transaction are held to the duty of utmost good faith. Misrepresentations and nondisclosures in the procurement of a policy of marine insurance will render the policy void *ab initio*. Marine Insurance Act of 1906, §§ 17 - 18 (5 EDW. 7, Ch. 41)(Eng.).

[3] Marine cargo insurance is a type of coverage that typically insures physical damage to cargo while in ocean transit, from warehouse to warehouse. This endorsement extended coverage further inland over those goods to be shipped.

Korea and other Asian countries.[4] Tandy did not tell Granite State, however, that (i) in March 1989 — less than a month before Tandy sought coverage — Tandy's Masan, Korea plant had been permanently closed and the company placed into liquidation due to labor unrest and (ii) on April 6, 1992 — just three weeks before soliciting a bid from Granite State — the striking workers had taken over the plant by force, locked out the management and seized the company's President.[5] Tandy gave Granite State no notice during bid negotiations that any property to be insured under the new policy was no longer in Tandy's care, custody and control, or was then in danger and subject to the whims of Tandy's striking labor force. To the contrary, Tandy expressly represented that "no losses" that the policy would cover had occurred.

Relying on these assertions of fact, Granite State bid on the requested coverage, and ultimately was chosen to write Tandy's marine cargo insurance. Coverage was bound effective June 22, 1989.

In January 1990, Granite State received its first notice of a loss at the Masan plant which allegedly occurred in December when Korean police stormed the warehouse to eject the strikers.[6] Within days, Granite State learned that the plant had been forcibly occupied, and that some insured property may have been damaged, before coverage was sought. Moreover, Granite State learned that Tandy had known of repeated acts of violence and the apparent theft of insured property from the Masan plant throughout 1989. Tandy had not reported those facts, as maritime insurance practice required, when the insurance was sought. By the

[4] ROA Vol. 2, pp. 144-145.

[5] See discussion ROA Vol. 3, pp. 16-18 and ROA Vol. 1, pp. 210-229.

[6] ROA Vol. 2, p. 3.

end of January 1990, Tandy told Granite State that Tandy believed the loss approached policy limits.[7]

On February 2, 1990, Granite State sent Tandy a letter reserving rights and defenses arising out of nondisclosure of material facts, possible misrepresentations, failure to give timely notice, and possible other insurance.[8] In that letter, Granite State advised Tandy that an investigation into the placement of the insurance and the amount of the loss would be required.[9] Over the next nine months, Granite State tried to get specific information from Tandy about the elements of the purported loss, but without success.[10] Despite its good-faith efforts, Granite State was unable either to evaluate its coverage or the extent of Tandy's damages.

Rather than decline coverage and risk a typical state court punitive damage claim, Granite State filed this action, as is common practice,[11] seeking a declaration of its rights under Tandy's policy.[12] Specifically, Granite State asserts that (i) Tandy failed to disclose facts material to the coverage, *i.e.*, that some of the property to be insured was no longer in Tandy's own care, but was being held hostage by Tandy's

[7] Granite State learned that property which was damaged included property insured by another company upon which Tandy had made a similar claim for full policy limits.

[8] In negotiations, Tandy stated that it had a similar warehouse endorsement in a prior policy.

[9] ROA Vol. 2, p. 3.

[10] In November 1990, Tandy sent Granite State a one-page printed form proof of loss, seeking the full $10 million policy limits, with no supporting documentation, and refused to provide any additional information. ROA Vol. 2, pp. 43-51.

[11] *See e.g.*, cases cited in Part I, Reasons for Granting the Writ.

[12] Although the loss in question purportedly occurred on land, the policy covering the loss was a marine insurance policy, subject to construction under traditional marine insurance law. Granite State filed this suit seeking a declaration with regard to the validity of the policy *at its inception.*

striking workers; (ii) Tandy actively misrepresented certain facts, *i.e.*, that there had been no losses to the property to be insured at the time the policy became effective, and (iii) accordingly, the policy of marine insurance was void *ab initio*.[13]

Tandy's reaction, less than a month after Granite State filed this declaratory judgment action, was to file suit against Granite State in Texas state court, seeking actual damages of $10 million (the policy limit). By amendment, exemplary and punitive damages of $100 million are being sought.[14] Tandy filed a motion to dismiss or stay this declaratory action pending resolution of the state court action. The district court granted Tandy's motion and ordered this litigation stayed, pending the resolution by the state court. The district court based its decision to abstain on two principal factors, namely, the possibility of piecemeal litigation, and Granite State's "race" to the courthouse, filing suit in anticipation of Tandy's expected litigation. Appendix, p. C-8. In doing so, the district court misapplied the abstention factors this Court approved in *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976) and *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983).

On appeal, the Court of Appeals for the Fifth Circuit reviewed the district court's decision solely for abuse of

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[13] Although only Granite State and Tandy are parties to the federal action, they are the only parties necessary for a declaration of whether or not the policy is void. Furthermore, all parties to the state court action can be joined under the Federal Rules of Civil Procedure.

[14] Also named as defendants were the various agents of both Tandy and Granite State, as well as the insurance company that insured Tandy prior to the inception date of the Granite State policy. That insurance, of course, is a different policy.

discretion, and affirmed. In doing so, the Fifth Circuit specifically rejected the analysis established under *Colorado River* and *Moses Cone*, which set out a more stringent test for federal abstention. As interpreted by the Court of Appeals, the exceptional circumstances required by this Court in all other abstention-type cases are unnecessary in decisions under the Declaratory Judgment Act. Appendix, pp. B-3 - B-4. Both in its deference to the district court's discretion and in its rejection of *Colorado River* and *Moses Cone*, the Fifth Circuit deviated from established practice in several other Circuits.

REASONS FOR GRANTING THE WRIT

I. In conflict with other Circuits, the Fifth Circuit reviewed the district court's decision to stay under a deferential abuse of discretion standard rather than *de novo*.

The Fifth Circuit, in the opinion below, has held that "the district court's handling of the declaratory judgment complaint is reviewed for abuse of discretion." Appendix, p. B-4 (citations omitted). In doing so, the Fifth Circuit is in accord with the Second Circuit in *General Reinsurance Corp.* v. *Ciba-Geigy Corp.*, 853 F.2d 78, 81 (CA2 1988). This deferential review directly conflicts with decisions of the Sixth, the Seventh, the Eighth, the Ninth, the Eleventh and the District of Columbia Circuits. *See Continental Cas. Co.* v. *Robsac Industries*, 947 F.2d 1367, 1370 (CA9 1991) (insurance dispute); *Allstate Ins. Co.* v. *Mercier*, 913 F.2d 273, 277 (CA6 1990) (insurance dispute); *Cincinnati Ins. Co.* v. *Holbrook*, 867 F.2d 1330, 1333 (CA11 1989) (insurance dispute); *International Harvester Co.* v. *Deere & Co.*, 623 F.2d 1207, 1217 (CA7 1980) (patent dispute); *Hanes Corp.* v. *Millard*, 531 F.2d 585, 591 (CADC 1976) (personal injury action). *See also GEICO* v. *Simon*, 917 F.2d 1144, 1147-49 (CA8 1990) (insurance dispute). Review by this Court is

necessary to provide consistent results among the Circuits on this matter of federal jurisdiction.

Decisions in the other Circuits highlight the importance of this issue. "Because theories of state and federal law, and expressions of federalism and comity, are so interrelated in the decision to abstain such dispositions are elevated to a level of importance dictating *de novo* appellate review." *Traughber* v. *Beauchane*, 760 F.2d 673, 676 (CA6 1985) (*Pullman* abstention). Specifically, the Sixth Circuit reviews *de novo* decisions involving the exercise of discretion under the Declaratory Judgment Act. *Mercier*, 913 F.2d at 277 (construction of a homeowners insurance policy); *see also Heitmanis* v. *Austin*, 899 F.2d 521, 527 (CA6 1990) (*Colorado River* abstention). The Ninth Circuit also reviews *de novo* the decision to exercise jurisdiction over insurance disputes under the Declaratory Judgment Act. *Continental Cas. Co.* v. *Robsac Industries, Inc.*, 947 F.2d 1367, 1370 (CA9 1991). *See also American Int'l Underwriters Inc.* v. *Continental Ins. Co.*, 843 F.2d 1253, 1256 (CA9 1988) (heightened standard of review in nondeclaratory judgment *Colorado River* abstention decision); *Mobil Oil Corp.* v. *City of Long Beach*, 772 F.2d 534, 540-41 (CA9 1985) (more stringent review of declaratory judgment *dismissals* than of decisions *not* to dismiss). *See also GEICO* v. *Simon*, 917 F.2d at 1147-49.

The Eleventh Circuit has specifically rejected deferential review in a declaratory judgment action, and uses its own judgment to resolve the issues. *Cincinnati Insurance*, 867 F.2d at 1333. "Although the district court has an area of discretion in deciding whether to grant or deny declaratory relief, that discretion should be exercised liberally in favor of granting such relief in order to accomplish the purposes of the Declaratory Judgment Act. The scope of appellate review of the exercise of such discretion is not under an

'arbitrary and capricious' standard but allows the appellate court to substitute its judgment for that of the trial court." 867 F.2d at 1333 (citations omitted).

The importance of this issue is not limited to the insurance context. The Seventh and the District of Columbia Circuits have reviewed declaratory judgment abstentions *de novo* in other contexts. The Seventh Circuit "does not defer to the judgment of the district court [but] must exercise its own sound discretion as to the propriety of the grant or denial of a declaratory judgment." *International Harvester*, 623 F.2d at 1217 (citations omitted) (patent violation). While there is "no absolute right to a declaratory judgment in the federal courts," in the District of Columbia Circuit, the grant or denial of declaratory relief is subject to "searching review." *Hanes*, 531 F.2d at 591.

The Sixth, the Seventh, the Eighth, the Ninth, the Eleventh and the District of Columbia Circuits review *de novo* abstention decisions in declaratory judgment cases. The deferential review accorded by the Second and the Fifth Circuits is in express conflict with the decisions of six other Circuits. The conflict between the standard applied in the Second and the Fifth Circuits, and the standard applied in the Sixth, the Seventh, the Eighth, the Ninth, the Eleventh and the District of Columbia Circuits, indicates that this problem extends beyond the particular facts of Granite State's dispute with Tandy. The breadth of the conflict, and the need to assure uniformity among the Circuits, supports the granting of the writ.

II. In conflict with decisions of other Circuits, the Fifth Circuit has expressly ignored this Court's mandate that federal courts have a virtually unflagging obligation to exercise their jurisdiction, and only exceptional circumstances justify abdication of that responsibility.

This case presents this Court with the opportunity to conclusively resolve what has become an increasingly tangled web of conflicting decisions issued by several courts of appeals on the factors appropriate for determining whether a court should abstain from exercising jurisdiction in a declaratory judgment action.

The majority of the Circuits have held that the factors articulated in *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976) and *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983) apply to the exercise of discretion under the Declaratory Judgment Act. *See GEICO* v. *Simon*, 917 F.2d 1144, 1147-49 (CA8 1990); *Villa Marina Yacht Sales* v. *Hatteras Yachts*, 915 F.2d 7 (CA1 1990); *Life-Link Intern., Inc.* v. *Lalla*, 902 F.2d 1493, 1495 (CA10 1990); *Heitmanis* v. *Austin*, 899 F.2d 521, 527 (CA6 1990); *American Mfrs. Mut. Ins.* v. *Edward D. Stone, Jr.*, 743 F.2d 1519, 1525 (CA11 1984); *General Reinsurance Corp.* v. *Ciba-Geigy Corp.*, 853 F.2d 78, 81 (CA2 1988). *See also University of Maryland* v. *Peat Marwick Main & Co.*, 923 F.2d 265, 271 (CA3 1991) (*Burford* abstention). By contrast, the Fifth Circuit in this case held those factors do not apply. Appendix, p. B-3. *Accord Continental Cas. Co.* v. *Robsac Industries, Inc.*, 947 F.2d 1367, 1370 (CA9 1991). This significant split between the Circuits as to the proper analysis to be applied in declaratory judgment actions suggests certiorari review is needed.

"Abdication of the obligation to decide cases can be justified under [the abstention] doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest." *Colorado River*, 424 U.S. at 813. The Fifth Circuit has held that, in declaratory judgment cases, a district court has virtually unfettered discretion. In accord with the Ninth Circuit in *Robsac*, 947 F.2d at 1370, the Fifth Circuit has held that *Colorado River* and *Moses Cone* do not apply to declaratory judgment actions. Had this case been brought in a district court in the First, the Second, the Third, the Sixth, the Eighth, the Tenth or the Eleventh Circuits, those courts would have allowed this case to proceed. Instead, due to the Fifth Circuit's approval of the use of a scheme contrary to the decisions of its sister circuits and the Supreme Court, this case is stayed. The circuit in which a case is filed should not determine the standard applied in exercising federal jurisdiction. Certiorari is warranted to resolve this conflict extending across nine circuits, and to assure uniformity of federal decisions on this issue of federal law.

CONCLUSION

This Court should hear this case to resolve a tangled web of decisions involving the abstention doctrine as applied in the declaratory judgment context. The Fifth Circuit's decision to allow unfettered discretion to stay duly-filed federal cases in light of later-filed state actions effectively eviscerates the declaratory judgment remedy that Congress enacted for situations just like the one in this case. The importance of these issues extends well beyond the facts of this dispute, for the outcome here will affect the abstention doctrine broadly, and the continued viability of the Declaratory Judgment Act. For these reasons, the Court should exercise its discretion to grant a writ of certiorari.

Respectfully submitted,

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June 25, 1992

NO.

IN THE

Supreme Court of The United States

OCTOBER TERM, 1991

GRANITE STATE INSURANCE COMPANY
Petitioner

v.

TANDY CORPORATION
Respondent

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 91-2467

GRANITE STATE INSURANCE COMPANY,

Plaintiff-Appellant,

VERSUS

TANDY CORPORATION AND
T C ELECTRONICS, (KOREA) LTD,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 3/30/92, 5 Cir., 198_, ___ F.2d ___)
(MAY 6, 1992)

Before WISDOM, JONES and SMITH, Circuit Judges.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The Judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ EDITH H. JONES
United States Circuit Judge

5/1/92

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 91-2467

GRANITE STATE INSURANCE COMPANY,

Plaintiff-Appellant,

v.

TANDY CORPORATION AND T. C. ELECTRONICS, (KOREA), LTD.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS (CA-H-91-213)

(March 30, 1992)

Before WISDOM, JONES, and SMITH, Circuit Judges.[1]

EDITH H. JONES, Circuit Judge:

Granite State Insurance Company (Granite State) filed this declaratory judgment action to determine, preferably, to avoid, its rights and responsibilities under its "Marine Cargo

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Policy" issued to Tandy Corporation and T.C. Electronics (Korea), Ltd. (jointly "Tandy"). Twenty-one days later, Tandy sued Granite State in a Texas state court under the policy for the $10 million policy limits. The district court stayed the federal declaratory judgment action pending the resolution of the state court action, and Granite State appealed. Finding no abuse of discretion, we affirm.

I.

Tandy operated an electronics plant at Masan, South Korea, where in the spring of 1989, Tandy began experiencing labor problems. The plant was closed beginning April 4, when members of the union staged a sit-down strike, then later rioted and occupied the plant. Tandy regained control in December.

Also in April, 1989 Tandy opened negotiations for insurance. Granite State successfully bid on a policy and bound coverage effective June 22, 1989, issuing a "Marine Open Cargo Policy" with an endorsement extending coverage to inventory in Korea.

It does not appear that Tandy notified Granite State that the property being insured under the new policy was in danger. On January 12, 1990, Granite was first informed via telefax of a loss and potential claim under the endorsement. The losses and claim originated at the South Korean plant during the period of worker occupation.

In January 1991, after investigating Tandy's claim, Granite State filed a declaratory judgment action in the U.S. District Court for the Southern District of Texas challenging Tandy's breach of the maritime doctrine of *uberrimae fidei* and its incomplete notice of loss and uncooperativeness in the investigation. Jurisdiction was alleged to lie in admiralty or diversity. Three weeks later, Tandy sued Granite State in Tarrant County, Texas, making a claim under the policy for

the policy limits and seeking treble damages for bad claims handling. On February 16, Tandy simultaneously answered Granite State's federal complaint and sought dismissal pursuant to Fed. R. Civ. P. 12(b)(7), or alternatively, a stay pending resolution of the state court action. Following briefing and argument, the federal district court decided to stay its proceedings in deference to the state court action.

II.

The first issue, raised by Tandy, is whether this court has appellate jurisdiction under 28 U.S.C. § 1292(a)(3), which confers appellate jurisdiction from certain interlocutory orders in admiralty cases. We decline to address this difficult and hotly disputed issue, because this court has jurisdiction under 28 U.S.C. § 1291 or the collateral order doctrine. The issues raised in this action will undoubtedly be litigated in the state court action for which it was stayed, and because of the stay, the federal court will be bound under principles of *res judicata* by the outcome of the state court suit. Where a stay order effectively dismisses the federal suit, as in this case, it is treated as a final order under § 1291. *See generally, Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 8-10, 103 S. Ct. 927, 934, 74 L.Ed.2d 765 (1983); *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715 n.2, 82 S. Ct. 1294, n.2, 8 L.Ed.2d 794 (1962). *Moses H. Cone* held alternatively that such an order is appealable, even if non-final, under the collateral order doctrine. 460 U.S. 11-13, 103 S. Ct. 934-35.

III.

The propriety of the district court's granting of the stay in this declaratory judgment action is governed by *Brillhart* v. *Excess Insurance Co. of America*, 316 U.S. 491, 62 S. Ct. 1173, 86 L.Ed. 1620 (1942), and the *Moses H.*

Cone[2]*/Colorado River*[3] factors, which set out a more stringent test for federal abstention, do not apply.[4] *Rowan Companies, Inc.* v. *Griffin*, 876 F.2d 26, 28-29 (5th Cir. 1989); *Mission Insurance Co.* v. *Puritan Fashions, Corp.*, 706 F.2d 599, 601 n.1 (5th Cir. 1983). *See also, Continental Casualty Co.* v. *Robsac Industries*, 947 F.2d 1367 (9th Cir. 1991) (holding that *Colorado River* abstention test is inapplicable where the Declaratory Judgment Act is involved). Under *Rowan* and *Mission*, the district court's handling of the declaratory judgment complaint is reviewed for abuse of discretion. *Rowan*, 876 F.2d at 29; *Mission*, 706 F.2d at 601.

According to *Brillhart*, the district court has discretion whether to decide a declaratory judgment action. *Mission Insurance*, 706 F.2d at 601 (*citing Brillhart*); *Rowan*, 876 F.2d at 28. The district court may not dismiss a request for declaratory relief "on the basis of whim or personal disinclination." *Hollis* v. *Itawamba County Loans*, 657 F.2d 746, 750 (5th Cir. 1981). *Rowan* outlined several factors

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[2] *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 103 S. Ct. 927 (1983).

[3] *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 96 S. Ct. 1236, 47 L.Ed.2d 483 (1976).

[4] There has been conflict among the cases in this circuit concerning whether the *Colorado River/Moses Cone* factors should apply to a declaratory judgment action. *See generally, Mission Insurance Co.* v. *Puritan Fashions, Corp.*, 706 F.2d 599, 601 n.1 (5th Cir. 1983) (holding that *Moses Cone/Colorado River* factors do not apply to declaratory judgment actions); *Evanston Insurance Co.* v. *Jimco, Inc.*, 844 F.2d 1185 (5th Cir. 1988) (apparently overlooking *Mission Insurance* in applying the *Moses Cone/Colorado River* factors to declaratory judgment proceedings). As this court did in *Rowan*, we must follow *Mission Insurance* because it was the first panel decision on this issue. We also note the *Rowan* court's finding that *Mission* states the better rule and is more consistent with the essence of the declaratory judgment act. *Rowan Companies, Inc.* v. *Griffin*, 876 F.2d 26, 29 n.2 (5th Cir. 1989).

pertinent to a district court's determination whether to decide a declaratory judgment suit:

> [D]eclaratory judgment relief may be denied because of a pending state court proceeding in which the matters in controversy between the parties may be litigated, because the declaratory complaint was filed in anticipation of another suit and is being used for the purpose of forum shopping, because of possible inequities in permitting the plaintiff to gain precedence in time and forum, or because of inconvenience to the parties or the witnesses.

Rowan, 876 F.2d at 28 (citations omitted). The *Rowan* list, however, is neither exhaustive, nor is it exclusive or mandatory. *Id.* at 28-29.

The district court determined that the Tarrant County proceeding provided an adequate alternative remedy for Granite State and that the state court proceeding provided a forum for the resolution of *all* disputes arising from Tandy's claim under the insurance policy.[5] *Granite State Insurance Company* v. *Tandy Corp.*, 762 F. Supp. 162, 158 (S.D. Tex. 1991). As noted by the district court, this factor militates in favor of a stay. *Id.*

The district court also found that Granite State filed this action in anticipation of an action brought by the defendants. *Id.* Tandy and Granite State engaged in lengthy negotiations over the investigation of Tandy's proof of loss,

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[5] Tandy brought two parties into the state court action which are not present in the federal forum. Tandy joined Alexander & Alexander of Texas, Inc., Tandy's outside insurance agent, and Granite State has alleged, *inter alia*, that Alexander & Alexander made misrepresentations in procuring the policy. Tandy also joined the insurance company that Tandy claims provided its similar coverage prior to Granite State. Granite State alleges that the losses at issue occurred prior to the effective date of its policy.

the insurance company did not deny coverage until it filed the declaratory action, and Tandy's state court action followed within weeks after Granite State thereby signalled its preferred denial of coverage. The district court recognized the similarity between the present action and that in *Mission Insurance Co.* v. *Puritan Fashions, Corp.*:

> In *Puritan Fashions*, the Fifth Circuit affirmed the district court's dismissal of a declaratory judgment action that was based on a pendency of a parallel proceeding in California state court. *Puritan Fashions*, 706 F.2d at 603. As in *Puritan Fashions*, the insurance company and the insured in this suit engaged in lengthy negotiations regarding an investigation of the insured's proof of loss. As in *Puritan Fashions*, the insurance company in this suit did not deny coverage until it filed a declaratory action. As in *Puritan Fashions*, because of the tenor of the parties' relations during the investigation, "there can really be no dispute that [the insurer] expected [the insured] to file suit if its claim was denied. *Puritan Fashions*, 706 F.2d at 602.

Granite State, 762 F. Supp. at 158. The district court also noted that this court has "affirmed a *dismissal* of an action for declaratory relief on this basis when the declaratory action was initiated two months after the filing of the suit in another jurisdiction." *Id.*, *citing Pacific Employer's Insurance Co.* v. *M/V Captain W.V. Cargill*, 751 F.2d 801, 804 (5th Cir.), *cert. denied*, 474 U.S. 909, 106 S. Ct. 279, 88 L.Ed.2d 244 (1985). The district court did not err in analogizing this case to *Puritan Fashions*.[6]

[6] Granite State's brief emphasizes the contention that its insurance contract was a maritime contract subject to federal law. We do not decide this question, for to do so would interject our views unduly upon the pending state action. We note, however, that it is at least arguable that the Endorsement sued upon is not maritime, or if so, is a mixed contract, in either of which cases state law would likely be applicable. Even if it is an admiralty contract, certain state law insurance principles are applicable. *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310, 75 S. Ct. 368 (1955). The characterization of the insurance Endorsement alone does not invoke the interests of uniformity for admiralty purposes that would require a federal forum. Granite State's argument therefore does not detract from the stay order.

For these reasons, we cannot say that the district court abused its discretion in granting the stay. The judgment of the district court is AFFIRMED.

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GRANITE STATE INSURANCE COMPANY, *Plaintiff,*	§	
V.	§	
TANDY CORPORATION and T.C. ELECTRONICS (KOREA) LTD., *Defendants.*	§	CIVIL ACTION NO. H-91-213

ORDER

Pending before this Court is a motion to dismiss or, in the alternative, for abatement of proceedings (Document #6) filed by the defendants. The Court held a hearing on the motion in open court on April 26, 1991. After having considered the motion, the submissions of the parties, the argument of counsel, and the applicable law, the Court determines that it should stay these proceedings pending resolution of a companion state court action.

Plaintiff Granite State Insurance Company ("GSIC") filed the instant suit in this Court on January 25, 1991. GSIC seeks declaratory relief under 28 U.S.C. § 2201 (1988), requesting that this Court issue findings that GSIC is not liable under a marine open cargo policy for losses allegedly incurred by the defendants to goods and equipment in Korea. The insurance policy was issued in favor of defendant Tandy Corporation ("Tandy") in 1989 and was to cover

specified losses from June 22, 1989. In late 1989, the defendants allegedly sustained losses to equipment and inventory during riots at a Korean manufacturing facility. GSIC's Houston underwriting agent, A-I Marine Adjusters, Inc. ("A-I"), received a notice of claim from Tandy under the policy on January 12, 1990. A-I sent Tandy a reservation of rights letter to Tandy within 30 days, and A-I thereafter attempted to procure information concerning the alleged loss from Tandy and from Tandy's outside insurance agent, Alexander & Alexander of Texas, Inc. ("A&A").

During the next several months the parties attempted, not without some difficulty, to resolve the insurer's requests for information. GSIC and the defendants acknowledge that by late 1990, the parties disagreed vehemently over Tandy's adherence to A-I's requests for information. In November 1990, Tandy sent A-I a sworn statement and proof of loss. A-I indicated to Tandy that Tandy's sworn statement and proof of loss was inadequate, but A-I did not inform Tandy that it was denying coverage. Instead, following the dispute over the sworn statement and proof of loss, GSIC filed the instant suit. After learning, through the filing of this suit, that GSIC was denying coverage, Tandy filed suit in Texas state district court within a month. That suit is currently pending in the 96th Judicial District Court of Tarrant County, Texas, under the caption *Tandy Corporation* v. *Granite State Insurance Company, Utica Mutual Insurance Company and Alexander & Alexander of Texas, Inc.*, Civil Action No. 96-133298-91. In the state court action, Tandy has joined A&A: GSIC has alleged, *inter alia*, that A&A made misrepresentations in procuring the policy. Tandy has also joined in the state court suit the insurance company that Tandy claims provided it similar coverage prior to GSIC: GSIC has also alleged that the losses at issue occurred prior to the effective date of its policy.

The defendants now request that this Court decline to exercise its discretionary jurisdiction over actions for declaratory relief and dismiss or stay the instant suit. Both sides recognize that a court's exercise of jurisdiction to grant declaratory relief is discretionary rather than mandatory. *Brillhart* v. *Excess Insurance Co. of America*, 316 U.S. 491, 494 (1942); *see Commercial Metals Co.* v. *Balfour, Guthrie, & Co.*, 577 F.2d 264, 266 (5th Cir. 1978); *909 Corp.* v. *Village of Bolingbrook Police Pension Fund*, 741 F. Supp. 1290, 1292 (S.D. Tex. 1990). A primary consideration in a court's decision to exercise jurisdiction in such a case is whether due to the pendency of other proceedings, the court's exercise of jurisdiction will result in piecemeal adjudication of a dispute. *See Hollis* v. *Itawamba County Loans*, 657 F.2d 746, 750 (5th Cir. Unit A Sept. 1981); 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2759, at 648 (2d ed. 1983). A court may also consider whether a declaratory complaint was filed in anticipation of the filing of a suit by a defendant in the declaratory action. *See Rowan Cos.* v. *Griffin*, 876 F.2d 26, 29 (5th Cir. 1989); *Pacific Employers Insurance Co.* v. *M/V Captain W.D. Cargill*, 751 F.2d 801, 804 (5th Cir.), *cert. denied*, 474 U.S. 909 (1985); *Amerada Petroleum Corp.* v. *Marshall*, 381 F.2d 661, 663 (5th Cir. 1967), *cert denied*, 389 U.S. 1039 (1968).

GSIC's claims regarding its liability for Tandy's claim on the insurance policy have led Tandy to bring into the state court suit two parties that are not present in this suit. If GSIC succeeds on its claim that the loss alleged by the defendants does not fall within the effective period of its policy, the defendants may need to seek recourse against their previous insurer. If GSIC succeeds on its claim that A&A made misrepresentations to A-I in obtaining the policy, the defendants may need to seek recourse against A&A. The issues as raised initially by GSIC have thus invoked

legal relationships that cannot be completely resolved in the confines of this suit. On the other hand, GSIC does not argue that it will be unable to litigate all coverage issues in the Tarrant County suit. *See Amerada Petroleum Corp.*, 381 F.2d at 663 (noting that plaintiff in the declaratory action at issue "is not in the position of one who cannot obtain an adjudication of its legal rights" in the companion proceeding). The Tarrant County proceeding's provision of an adequate alternative remedy for GSIC's claims, taken together with the potential for resolution in the state court proceeding of all disputes arising from Tandy's claim under the insurance policy, thus militates in favor of a stay of this suit. *See Mission Insurance Co.* v. *Puritan Fashions Corp.*, 706 F.2d 599, 603 (5th Cir. 1983).

For purposes of determining whether the instant suit was initiated in anticipation of an action brought by the defendants, the Court finds that the facts of this case are very similar to those in *Puritan Fashions*. In *Puritan Fashions*, the Fifth Circuit affirmed the district court's dismissal of a declaratory judgment action that was based on the pendency of a parallel proceeding in California state court. *Puritan Fashions*, 706 F.2d at 603. As in *Puritan Fashions*, the insurance company and the insured in this suit engaged in lengthy negotiations regarding an investigation of the insured's proof of loss. As in *Puritan Fashions*, the insurance company in this suit did not deny coverage until it filed the declaratory action. As in *Puritan Fashions*, because of the tenor of the parties' relations during the investigation, "there can really be no dispute that [the insurer] expected [the insured] to file suit if its claim was denied." *Puritan Fashions*, 706 F.2d at 602.

Furthermore, Tandy filed the state court action shortly after GSIC indicated its denial of coverage by filing the declaratory action. The Fifth Circuit has affirmed a *dismissal*

of an action for declaratory relief on this basis when the declaratory action was initiated two months prior to the filing of the suit in another jurisdiction. *Pacific Employers Insurance Co.*, 751 F.2d at 804. Here, Tandy initiated the state court action within a month of the filing of this suit. After having considered the circumstances of the filing of the suits, and the relations between the parties before the suits were initiated, the Court concludes that GSIC filed the instant suit in anticipation of an action that GSIC knew would be filed immediately after it gave notice to the defendants of its intent to deny coverage. *Cf. Casualty Indemnity Exchange* v. *High Croft Enterprises, Inc.*, 714 F. Supp. 1190, 1193-94 (S.D. Fla. 1989); *State Farm Fire & Casualty Co.* v. *Taylor*, 118 F.R.D. 426, 430 (M.D.N.C. 1988).

It is unclear whether in this circuit a court need also consider the abstention factors set out in *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976), in deciding whether to decline to exercise immediate jurisdiction over an action for declaratory relief because of the pendency of a companion state court proceeding. *See Rowan Cos.*, 876 F.2d at 29 n.2 (indicating that *Colorado River* analysis probably should not apply in cases involving requests for declaratory relief); *Sandefer Oil & Gas, Inc.* v. *Duhon*, 871 F.2d 526, 528 (5th Cir. 1989) (noting, but declining to resolve, apparent conflict between *Puritan Fashions* and *Evanston Insurance Co.* v. *Jimco, Inc.*, 844 F.2d 1185 (5th Cir. 1988)); *Puritan Fashions*, 706 F.2d at 601 n.1 (holding that because exercise of jurisdiction in declaratory actions is discretionary, such actions are not subject to *Colorado River* analysis under *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983)). In an abundance of caution, the Court will also consider the *Colorado River* factors.

As GSIC points out, "[g]enerally, as between state and federal courts, the rule is that 'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.' " *Colorado River*, 424 U.S. at 817 (quoting *McClellan* v. *Carland*, 217 U.S. 268, 282 (1910)). However, "the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration . . ., though exceptional, do nevertheless exist." *Colorado River*, 424 U.S. at 818.

In deciding whether to abstain from hearing a case due to the pendency of a similar state court action, a federal district court may consider the following factors: (1) the avoidance of exercises of jurisdiction over particular property by more than one court, (2) the inconvenience of the federal forum, (3) the desirability of avoiding piecemeal litigation, (4) the order in which jurisdiction was obtained by the concurrent forums, (5) the applicability of federal or state law to the merits of the claims at issue, and (6) the adequacy of the state court proceedings to protect the rights of the party that invoked the federal court's jurisdiction. *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 15-16, 23 (1983); *Colorado River*, 424 U.S. at 818; *Evanston Insurance Co.* v. *Jimco, Inc.*, 844 F.2d 1185, 1190 (5th Cir. 1988); *Goerner* v. *Barnes*, 730 F. Supp. 767, 768 (S.D. Tex. 1990).

When a court considers whether to exercise *Colorado River*-type abstention, it should "take[ ] into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise." *Colorado River*, 424 U.S. at 818-19; *see Moses H. Cone*, 460 U.S. at 15-16; *Goerner*, 730 F. Supp. at 768. As applied here, at least three of the factors under *Colorado River* and *Moses H. Cone*

indicate that this Court should decline to hear the instant suit.

The second *Colorado River* factor "primarily involves the physical proximity of the federal forum to the evidence and witnesses." *Evanston Insurance Co.*, 844 F.2d at 1191. Even considered in the light most favorable to GSIC, this Court does not represent the most convenient forum for the parties. The only relation of this district to the underlying dispute lies in the local negotiations regarding the insurance policy between A&A and A-I. Those negotiations have been raised by GSIC as a grounds on which it might avoid liability, but they are not the only such grounds: for example, GSIC seeks a declaration that any losses (which occurred in Korea) were sustained outside of the policy's effective period or resulted from the defendants' "deliberate abandonment of their property in Korea." Complaint for Declaratory Judgment at 20.

Furthermore, GSIC is a New Hampshire corporation with its principal place of business in Manchester, New Hampshire. Tandy is a Delaware corporation with its principal place of business in Fort Worth, Tarrant County, Texas. Defendant T. C. Electronics (Korea) Ltd. is a Korean corporation with its principal place of business in Masan, Korea. If, as GSIC's attorneys have suggested, the instant suit represents a "case between principals," then most of the witnesses germane to this dispute are located outside of this district. Likewise, most of the documentary evidence related to this dispute would be found not within this district but at the parties' corporate offices, which are located outside this district. Because at least one of the parties and numerous documents and witnesses relevant to this dispute are located in Tarrant County, the venue of the state court action would ameliorate the overall burdens of litigation on the instant

parties. *See Colorado River*, 424 U.S. at 820 (finding significant a 300-mile distance between the state and federal courts at issue); *Goerner*, 730 F. Supp. at 769 (noting the distance between the Southern District of Texas and an Oklahoma state court); *cf. Signad, Inc.* v. *City of Sugar Land*, 753 F.2d 1338, 1340 (5th Cir.) (noting, in reversing exercise of abstention by a district court, that the federal court and state court at issue "are equidistant from . . . where the dispute arose"), *cert. denied*, 474 U.S. 822 (1985).

The Court ascertains under the third *Colorado River* factor the danger of piecemeal and inconsistent adjudication between the instant suit and the Tarrant County action. As this litigation now stands, Tandy could conceivably proceed to trial on its claims against GSIC and thus force GSIC to litigate some if not all of its claims regarding coverage. It would much better serve "wise judicial administration" to have all potential disputes resulting from Tandy's claim under the policy resolved in one suit. *See Brillhart*, 316 U.S. at 495, *cited by Colorado River*, 424 U.S. at 818; *cf. Moses H. Cone*, 460 U.S. at 20 (finding an absence of danger of piecemeal litigation because "relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement").

Because the Court has found that this action was filed in anticipation of a suit that would be brought by the defendants, application of the fourth *Colorado River* factor indicates that abstention is warranted. The Court has found that by initiating what is in this situation the first-filed suit, GSIC intended to forestall a foreseeable state court suit by the defendants. *Cf. Moses H. Cone*, 460 U.S. at 21 (finding that the party initiating the second-filed federal action had had "no reasonable opportunity" to file its suit prior to the filing of the state court suit).

The *Colorado River* Court indicated that a federal court may also consider, as part of the fourth-factor inquiry, the absence of progress in the federal court litigation. *Colorado River*, 424 U.S. at 820; *Moses H. Cone*, 460 U.S. at 21-22. The parties did not inform the Court of the status of the suit in Tarrant County, but the Court notes that the instant suit has not passed the stage of rule 12 motions. The defendants have not taken any action before this Court other than to file an answer, the instant motion, and related briefs, and GSIC has merely filed its complaint and response to the defendants' motion. *See Colorado River*, 424 U.S. at 820 (noting "the apparent absence of any proceedings in the District Court, other than the filing of the complaint, prior to the motion to dismiss").

The sixth element of the *Colorado River/Moses H. Cone* inquiry "can only be a neutral factor or one that weighs against, not for, abstention." *Evanston Insurance Co.*, 844 F.2d at 1193. As set out above, the sixth factor provides no added weight in favor of this Court's retention of jurisdiction. GSIC has not shown that it would be unable to pursue the claims that it presses in this Court in the Tarrant County proceeding. *See Goerner*, 730 F. Supp. at 771.

The Court thus determines that under *Brillhart* and its progeny, a stay of these proceedings is warranted pending resolution of the companion state court action. Furthermore, based on its application of the factors enunciated in *Colorado River* and *Moses H. Cone*, the Court determines that this case presents those circumstances that warrant a stay due to the pendency of a parallel state court proceeding.

Based on the foregoing, the Court

ORDERS that this action is hereby STAYED pending resolution of *Tandy Corporation* v. *Granite State Insurance Company, Utica Mutual Insurance Company and Alexander & Alexander of Texas, Inc.*, Civil Action No. 96-133298-91,

currently pending in the 96th Judicial District Court of Tarrant County, Texas.

SIGNED at Houston, Texas, on this the 30 day of April, 1991.

/s/ DAVID HITTNER

David Hittner
United States District Judge

No. 91-2086

IN THE

Supreme Court of The United States

OCTOBER TERM, 1991

GRANITE STATE INSURANCE COMPANY,
Petitioner,

v.

TANDY CORPORATION AND
T. C. ELECTRONICS (KOREA) LTD.,
Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. Under either de novo review or an abuse of discretion standard, was the district court's stay order proper in a declaratory judgment action in which parallel state proceedings were pending?

II. If the *Colorado River* and *Moses Cone* standards for absention were applied to the district court's stay order, would the stay have been proper?

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The respondents, Tandy Corporation and T. C. Electronics (Korea), Ltd.,[1] respectfully ask that the Court deny petitioner's request for a writ of certiorari to review the judgment and opinion

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[1] T. C. Electronics (Korea), Ltd., is a wholly owned subsidiary of Tandy Corporation. Tandy Corporation has no subsidiaries other than those that are wholly owned. The following joint ventures are partially owned by Tandy Corporation or one of its wholly owned subsidiaries: PTCC, Inc.; Radio Shack de Mexico, S.A. de C.V.; Tandy Electronics (China) Ltd.; Tandy Mobira Communications Corp.; Tandy/Rank Video; and TNC Co. Tandy owns the following partnership: 200 Houston Street Associates.

of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on March 30, 1992.

STATEMENT OF THE CASE

Granite State's statement of the case is misleading. For this reason, Tandy submits the following.

This petition arises from an order staying federal declaratory judgment proceedings pending resolution of a state court action. (R.I, 196). The underlying suits arise from Granite State Insurance Company's coverage dispute with its insureds, Tandy Corporation and T. C. Electronics (Korea) Ltd. (R.II, 122).

In early 1989, Alexander & Alexander ("A & A"), acting as Tandy's agent (R.II, 112), began negotiations with American International Marine Agency, Inc. ("AIMA"), the underwriting agent for Granite State. (R.II, 144). Tandy was not involved in any direct negotiations with either AIMA or Granite State. A & A sought replacement coverage for Tandy's global marine insurance policy, which covered, among other things, inventory, raw materials, work in process, and finished goods located in Tandy's plant in M´ısan, Korea. Ultimately, Granite State was awarded the contract and coverage began in June 1989. (R.II, 146).

In the spring of 1989, Tandy began experiencing labor problems at the Masan plant, which culminated with the strikers taking control of the plant in late 1989. The police stormed the plant, arrested 21 strikers, and restored possession to Tandy in December, 1989. (R.I, 209). Tandy first became aware of damage at the Masan plant upon its entry into the Masan plant under the protection of the Korean police. Tandy's coverage claims are based on these events. None of its claims relate to any maritime provisions in the insurance policy.

Shortly after it became aware of the damage, on January 12, 1990, Tandy's agent, A & A, gave Granite State's claims agent, AI Marine Adjusters, Inc., notice of a potential claim for losses sustained from rioting workers. AI responded by sending Tandy a reservation of rights letter and requesting additional information. (R.II, 175).

Tandy produced tens of thousands of documents to Granite State. Adjusters and accountants representing American International Underwriters companies spent weeks in the Far East investigating the loss. At all times, Tandy fully cooperated with Granite State's investigation. Negotiations and exchanges of information were ongoing. Throughout the spring and summer of 1990, Tandy operated under the belief that Granite State was in the process of working out its claim.

Ultimately, in November 1990, Tandy submitted to Granite State a sworn statement of proof of loss for the policy limits of $10 million. (R.II, 43, 186). Under the terms of Tandy's policy with the insurance company, Granite State was obligated to make payment within 30 days after submission of Tandy's proof of loss. Granite State did not pay the claim; Granite State did not deny the claim. Instead, 10 days after Tandy submitted its proof of loss, in a race to the courthouse, Granite State filed an action for declaratory relief on January 25, 1991 in the United States District Court for the Southern District of Texas, Houston Division. (R.II, 122).

After learning through the filing of this suit that Granite State was disputing coverage, Tandy Corporation and T. C. Electronics (Korea) Ltd., on February 15, 1991 filed suit against Granite State in Tarrant County, Texas state district court. In the state district court suit, Tandy joined additional parties: Tandy's insurance agent A & A, and Tandy's previous insurer Utica Insurance Company. (R.II, 99). Tandy later amended its state court petition to include as additional defendants AI Marine

Adjusters, Inc., Insurance Company of the State of Pennsylvania, and American International Underwriters Corporation.

In the federal case, Tandy answered Granite State's complaint and filed a motion asking the court to decline to exercise its discretionary jurisdiction over actions for declaratory relief, and dismiss or stay the federal suit until the state district court action was resolved. (R.II, 99, 109). The resulting stay order is the subject of Granite State's petition.

SUMMARY OF ARGUMENT

Regardless of whether the circuit court applied an abuse of discretion standard or reviewed the case *de novo*, it would have reached the same result: the district court properly abstained from hearing the declaratory judgment action pending a parallel state court proceeding. Granite State sought to forum shop this case, which is based on state law and for which the federal forum would not dispose of all the issues and parties.

The Fifth Circuit also held that the *Colorado River* and *Moses Cone* factors, which determine whether a federal court should abstain, do not apply to declaratory judgments. However, even applying those factors to this case, the stay order was proper.

ARGUMENT

The decision of the court of appeals is correct in affirming the district court's stay of federal proceedings pending determination of parallel state court proceedings. Further, there is no meaningful conflict between the decision of the Fifth Circuit and cases from other circuits, including those cited by Granite State. There is no basis for review of this case by this Court.

I. Under either abuse of discretion or de novo review, the district court's stay would be upheld under cases reviewing abstention in declaratory judgment actions.

Granite State initially complains of the failure of the Fifth Circuit to review the district court's decision to stay under an abuse of discretion standard rather than by *de novo* review. Yet, all of the circuits would have upheld the stay order regardless of the standard of review used.

This is an insurance dispute governed by issues of state law.[2] (Order at 4; R. I. 199). In addition, Granite State was forum shopping when it filed the federal suit. It did not deny coverage until after it had filed the declaratory judgment action and, because of the tenor of the parties' relations during the investigation, there can be no dispute that Granite State expected Tandy to file suit if the claims were denied. Finally, the federal suit would be duplicative because it would not resolve disputes with other parties; the state claim potentially would resolve disputes with all the parties. Review of these factors by de novo review rather than with an abuse of discretion standard would not change the result.

The appellate courts, including many of those cited by Granite State, frequently rely on *Brillhart* v. *Excess Ins. Co.*, 316

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[2] Granite State attempts to bootstrap federal jurisdiction through its contention that its insurance contract was a maritime contract subject to federal law. The Fifth Circuit disposed of this argument as follows:

> We note, however, that it is at least arguable that the Endorsement sued upon is not maritime, or if so, is a mixed contract, in either of which cases state law would likely be applicable. Even if it is an admiralty contract, certain state law insurance principles are applicable. *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310, 75 S. Ct. 368 (1955). The characterization of the insurance Endorsement alone does not invoke the interests of uniformity for admiralty purposes that would require a federal forum. Granite State's argument therefore does not detract from the stay order.

(Op. at 7, n. 6).

U.S. 491, 62 S. Ct. 1173, 86 L.Ed. 1620 (1942). Under *Brillhart*, the district court should not ordinarily exercise its discretion to hear declaratory judgment actions where there is another suit between the parties pending in state court that presents the same issues, not governed by federal law.

The Court's rationale in *Brillhart* had three principal bases: 1) avoidance of having federal courts needlessly determine issues of state law; 2) discouraging litigants from filing declaratory judgment actions as a means of forum shopping; and 3) avoiding duplicative litigation. As indicated above, all of these factors are present here.

Granite State is correct insofar as some circuits use *de novo* review rather than an absence of discretion standard. In spite of the different standards, there is no practical difference in the result. The fact that the other circuits, regardless of the standard applied, would have affirmed the stay order is demonstrated by Granite State's own authority.

Four of the five cases cited by Granite State that review abstention *de novo* in declaratory judgment actions (Petition at 7) support Tandy's position, because in them the court of appeals ordered abstention. *Continental Cas. Co.* v. *Robsac Indus.*, 947 F.2d 1367 (9th Cir. 1991); *Allstate Ins.* v. *Mercier*, 913 F.2d 273 (6th Cir. 1990); *International Harvestor Co.* v. *Deere & Co.*, 623 F.2d 1207 (7th Cir. 1980); *Hanes Corp.* v. *Millard*, 531 F.2d 585 (D.C. Cir. 1976). In each of these cases, the district court had actually assumed jurisdiction over the declaratory judgment and the appellate court reversed the district court's refusal to abstain.

Only one of the cases relied upon by Granite State actually resulted in abstention. In that case, the determination that abstention was improper hinged on a factor not present here. In *Cincinnati Ins. Co.* v. *Holbrook*, 867 F.2d 1330, 1333 (11th Cir. 1989), state law provided no adequate remedy. State law would not have allowed resolution of a declaratory judgment until the

underlying claim had been resolved. Here, state law provides an adequate remedy.

The consequence of Granite State's argument in this case is that if an insurance company decides to bring its insured to an inconvenient forum, it can do so by racing to the courthouse with a declaratory judgment action. Regardless of the degree of bad faith in which that action is brought, the district court would have little or no discretion over whether to hear it. That is the reasoning by which Granite State urges the conflict. That is not the law.

II. Even if *Colorado River* and *Moses H. Cone* factors apply, the trial court properly balanced those factors to refuse to exercise its jurisdiction.

Granite State also argues that the Fifth Circuit should have applied *Colorado River* and *Moses Cone* factors to determine whether the stay was proper. Even applying the factors set out in these cases, the district court properly determined to refuse to exercise jurisdiction. For this additional reason, this case is not appropriate for consideration by this Court.

Under *Colorado River* and *Moses H. Cone*, this Court set out the following factors in determining whether to abstain from hearing a case due to the pendency of a similar state court action:

(1) the avoidance of exercise of jurisdiction over particular property by more than one court;

(2) the inconvenience of the federal forum;

(3) the desirability of avoiding piecemeal litigation;

(4) the order in which jurisdiction was obtained by the concurrent forums;

(5) the applicability of federal or state law to the merits of the claims at issue; and

(6) the adequacy of the state court proceedings to protect the rights of the party that invoked the federal court's jurisdiction.

Moses H. Cone Memorial Hospital v. *Mercury Construction Corp.*, 460 U.S. 1, 15-16, 103 S. Ct. 927, 74 L. Ed. 765 (1983); *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 818, 96 S. Ct. 1236, 47 L. Ed. 483 (1976).

The district court addressed these factors. To the extent they apply, they overwhelmingly support abstention. (Order at 8; R.I, 203).

A. The second factor, inconvenience of the federal forum, supports the district court's decision to decline to hear the case. The district court explained its application of this factor as follows: "Even considered in the light most favorable to [Granite State], this court does not represent the most convenient forum for the parties." (Order at 8, 9; R.I., 203-204).

All of the parties are incorporated and have their principal places of business in different locations — all distant from this forum. (Order at 8, 9). The district court noted:

> If, as [Granite State's] attorneys have suggested, the instant suit represents a "case between principals," then most of the witnesses germane to this dispute are located outside of this district. Likewise, most of the documentary evidence related to this dispute would be found not within this district but at the parties' corporate offices, which are located outside this district. Because at least one of the parties and numerous documents and witnesses relevant to this dispute are located in Tarrant County, the venue of the state court action would ameliorate the overall burdens of litigation on the instant parties.

(Order at 8, 9; R.I, 203-204). This factor was never challenged and is binding on Granite State.

B. The factor concerning the danger of piecemeal litigation also weighs in favor of abstention. As the district court wrote, Tandy could conceivably proceed to trial on its claims against Granite State and thus force Granite State to litigate some if not all of its claims regarding coverage. (Order at 9). The administration of justice would be better served if all the potential disputes resulting from Tandy's claim were resolved in one suit.

C. The fourth factor, the order in which jurisdiction was obtained by the concurrent forms, also favors abstention. The district court found that Granite State brought this suit to forestall a foreseeable state court suit by Tandy. (Order at 9, 10).

D. The additional factor of absence of progress in the federal litigation supports abstention. In the federal case, there had been virtually no progress. Tandy had not taken any action other than to file an answer, the motion for abstention, and related briefs, and Granite State has merely filed its complaint and response to the defendants' motion. (Order at 10).

E. Finally, the state court proceedings adequately protect Granite State's rights. The district court determined that:

> [Granite State] has not shown that it would be unable to pursue the claims that it presses in this Court in the Tarrant County proceeding.

(Order at 11).

Accordingly, even if *Colorado River* and *Moses H. Cone* apply, the district courts properly applied the factors for consideration of whether a federal court should abstain from hearing a case due to a pending state court action. The court's findings under those factors meet the bases for abstention set out in *Colorado River* and *Moses H. Cone*.

Thus, there is no conflict with any decision of this Court or with any decision of any other circuit. Granite State presents no question that merits this Court's review.

CONCLUSION

For these reasons, the Court should deny the petition for writ of certiorari.

Respectfully submitted,

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PETITIONER'S

BRIEF

No. 91-2086

In The

Supreme Court of the United States

October Term, 1992

GRANITE STATE INSURANCE COMPANY,

Petitioner,

vs.

TANDY CORPORATION and
T. C. ELECTRONICS (KOREA) LTD.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I. May a federal court that clearly has jurisdiction over a declaratory judgment action in a case brought pursuant to federal law abstain from exercising that jurisdiction in light of a later-filed action in a state court?

II. Should a district court's abstention decision in a declaratory judgment context be reviewed *de novo* by the court of appeals?

III. Did the district court and the court of appeals err in failing to consider the unflagging obligation to exercise jurisdiction and the applicability of federal maritime law to this declaratory judgment dispute?

LIST OF PARTIES

The parties to the proceedings below are Granite State Insurance Company, Tandy Corporation and T.C. Electronics (Korea) Ltd.

Parallel litigation filed by Tandy in Texas state court involves the following parties:

1. Tandy Corporation
2. Granite State Insurance Company
3. American International Marine Adjusters, Inc.
4. Insurance Company of the State of Pennsylvania
5. American International Underwriters Corporation
6. Alexander & Alexander of Texas, Inc.
7. Utica Mutual Insurance Company.

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On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals for the Fifth Circuit denying rehearing and rehearing en banc is not reported, but is reprinted at Pet. for Cert. App. A-1.[1]

The opinion of the court of appeals for the Fifth Circuit is not reported, but is reprinted at Pet. for Cert. App. B-1.

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[1] The Appendix to the Petition for Writ of Certiorari is cited as "Pet. for Cert. App. ___." The Joint Appendix filed with this Brief on the Merits is cited as "J.A. ___."

The opinion of the District Court for the Southern District of Texas is reported at 762 F.Supp. 156 (S.D. Tex. 1991) and is reprinted at Pet. for Cert. App. C-1.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1988). The court of appeals for the Fifth Circuit rendered its decision on March 30, 1992. A suggestion for rehearing en banc was filed on April 13, 1992 and denied on May 1, 1992. A petition for writ of certiorari was timely filed on June 26, 1992; this Court granted certiorari on October 5, 1992.

This case was originally filed in the United States District Court for the Southern District of Texas under federal maritime jurisdiction, 28 U.S.C. § 1333 (1988), and diversity jurisdiction, 28 U.S.C. § 1332 (1988), seeking relief under the Declaratory Judgment Act, 28 U.S.C. § 2201(a) (1988). This case was appealed to the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. §§ 1292(a)(3) and 1291 (1988).

STATUTES INVOLVED

United States Constitution, art. III, § 2[1].

> The judicial Power [of the United States] shall extend . . . to all cases of admiralty and maritime jurisdiction . . . [and] between Citizens of different states. . . .

28 U.S.C. § 2201(a) (1988). Declaratory Judgment Act.

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT OF THE CASE

This appeal arises out of a dispute between Tandy Corporation ("Tandy") and Granite State Insurance Company ("Granite State") over a $10 million claim asserted by Tandy as the assured under a Granite State ocean marine cargo policy. Granite State filed this suit, seeking a declaration that the federal maritime doctrine of *uberrimae fidei*[2] rendered the insurance policy void from its inception due to Tandy's material misrepresentations and nondisclosures. Jurisdiction was based on admiralty because of the maritime character of the insurance policy and on diversity. Granite State is a New Hampshire corporation with its principal place of business in New Hampshire. Tandy is a Delaware corporation with its principal place of business in Tarrant County, Fort Worth, Texas.

[2] The federal maritime doctrine of *uberrimae fidei* requires that both parties to a marine insurance contract act with the utmost good faith in all dealings relating to the policy.

Although headquartered in Texas, Tandy, through a Korean subsidiary, operated an electronics plant at Masan, South Korea. Tandy closed the plant due to labor unrest on March 6, 1989, and placed its Korean subsidiary into liquidation on March 31, 1989. On April 6, 1989, striking Tandy workers overran the plant, and forcibly shut out the liquidator. (Pet. for Cert. App. A-4; J.A. 10). On April 11, 1989, striking workers kidnapped the former president of the Masan factory, held him hostage and threatened to murder him if Tandy did not accede to the workers' demands. These facts are essentially uncontested. (*See* Tandy's Response to Petition for Writ of Certiorari, p. 2; Tandy's Brief to Fifth Circuit, p. 3).

In the midst of this turmoil, on April 26, 1989, Tandy solicited from Granite State a bid for Marine Open Cover Cargo Insurance. This coverage was to insure Tandy for physical damage to its property during world-wide transportation. During policy negotiations, Tandy told Granite State that similar insurance was then in place, including an endorsement which extended coverage to inventory, work-in-progress and raw materials at Tandy's factories and warehouses in various Asian countries, including South Korea. (J.A. 6-7). Tandy specifically asked Granite State for this same endorsement.

Marine cargo policies traditionally exclude damage caused by strikes, riots and civil commotions ("SR&CC coverage"). This coverage can be "bought back" into the policy by endorsement. Tandy specifically requested that Granite State provide SR&CC coverage.

At no time during the negotiations did Tandy inform Granite State of the takeover of the Masan plant, or that

any property to be insured under the new policy was no longer under Tandy's control, but subject to the whims of Tandy's striking labor force. To the contrary, Tandy expressly represented that "there have been no losses at any of the warehouse/assembly operations." (J.A. 15-16). Granite State bid on the requested coverage, relying on Tandy's representations, and ultimately was chosen to write Tandy's marine cargo insurance. Coverage was bound effective June 22, 1989, and included the inland endorsement and the SR&CC coverage that Tandy sought.

In January 1990, Granite State received its first notice of a loss at the Masan plant. (J.A. 17). Within days, Granite State learned of the March 1989 occupation and of damage to some insured property before coverage was sought. Moreover, Granite State learned that there had been repeated acts of violence and possibly theft of insured property from the Masan plant throughout 1989. Tandy regained control of the Masan plant on December 21, 1989 after Korean riot police stormed the building and arrested the former workers. Tandy did not report the takeover, riot or damage caused by the riot, as maritime insurance practice and the terms of the policy required, until January 12, 1990. By that time, Tandy's liquidator had removed all desired assets and sold the remaining property, including perhaps $5 million in undamaged insured inventory, to a scrap dealer. By the end of January 1990, Tandy informed Granite State that the loss approached the $10 million policy limits.

On February 2, 1990, Granite State sent Tandy a letter reserving rights and defenses arising out of non-disclosure of material facts, possible misrepresentations,

failure to give timely notice, and possible other insurance. In that letter, Granite State advised Tandy that an investigation would be required into both the placement of the insurance and the amount of the loss. (J.A. 83-89).

Between March and December 1990, Granite State tried on numerous occasions to get information from Tandy about the specific elements of the loss. Granite State's independent investigation revealed that most of Tandy's "damage" was economic loss, not covered by Granite State's policy, and that the insured physical loss was estimated by Tandy's own liquidator and accountants to be less than $100,000. (ROA Vol. 2, 31-50).[3] On November 28, 1990, Tandy sent Granite State a one-page printed form proof of loss, without supporting documentation, seeking the full $10 million policy limits. (J.A. 99-103). Granite State told Tandy that this was inadequate proof and reiterated its earlier requests for information. (J.A. 104-105). Tandy responded but provided very little new information. Additionally, Tandy informed Granite State that it would provide no further information. (ROA Vol. 2, 49-51).

Despite its good-faith efforts, Granite State was unable to evaluate coverage or the extent of Tandy's actual damages. The information that Granite State did obtain indicated significant coverage problems. Rather than decline coverage and risk the inevitable punitive damage claim in the insured's home forum, Granite State filed this action in a neutral forum, seeking a declaration of its rights, specifically a determination under federal

[3] Record references are cited as "ROA ___".

maritime law of the validity of the marine insurance policy *at its inception*.

Granite State based its claim on (i) Tandy's failure to disclose facts material to the coverage; *i.e.*, the history of violent labor unrest and that some insured property was being held hostage by Tandy's striking workers; and (ii) Tandy's active misrepresentation of certain facts; *i.e.*, that there were no losses to the property insured at the time the policy became effective, when, in fact, there was a loss in progress. (J.A. 20-21). Consequently, Granite State sought a declaration that the marine insurance policy was void *ab initio* under the maritime doctrine of *uberrimae fidei*. This suit was filed to obtain a judicial interpretation of policy validity, and specifically, to avoid the dire consequences under Texas law for wrongfully denying coverage.

Less than a month after this declaratory judgment action was filed, Tandy sued Granite State in Texas state court, seeking actual damages of $10 million (the policy limits), plus exemplary and punitive damages.[4] Tandy filed suit in the state court of Tarrant County, Fort Worth, Texas where Tandy has its principal place of business, and where Tandy is one of the largest employers in the county.[5]

[4] Tandy's amended state court suit seeks $10 million in actual and $100 million in punitive damages.

[5] Also named as defendants in the state court action were the various agents of both Tandy and Granite State, as well as Tandy's prior marine cargo insurance company.

Tandy then filed a motion to dismiss or stay this action, pending resolution of the later-filed state court action. The district court granted Tandy's motion, and ordered this litigation stayed. The district court based its abstention decision on two principal factors: (i) the pendency of the state court action and the attendant possibility of piecemeal litigation, and (ii) Granite State's alleged "race" to the courthouse, filing suit in anticipation of Tandy's expected litigation. (Pet. for Cert. App. C-4 to C-5).

The district court engaged in a cursory review of some of the abstention factors set out in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976) and *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). (Pet. for Cert. App. C-5 to C-9). The district court did not, however, as directed by *Colorado River* and *Moses Cone*, consider its "unflagging obligation" to exercise jurisdiction, or heavily weigh all factors in favor of the exercise of jurisdiction. Moreover, the district court did not identify any "exceptional circumstances" that would justify abstention and wholly failed to consider that federal maritime law, not state insurance law, governs the issues raised in this litigation.

The court of appeals affirmed. It held that *Colorado River* and *Moses Cone* do not apply to declaratory judgment actions. (Pet. for Cert. App. B-3 to B-4). In so holding, the Fifth Circuit ignored the "virtually unflagging obligation" to exercise jurisdiction absent "exceptional circumstances." Believing that Declaratory Judgment Act

decisions are committed to the district court's sound discretion, the Fifth Circuit refused to set aside the district court's stay order. (Pet. for Cert. App. B-7).

SUMMARY OF ARGUMENT

This is a maritime action, involving principles of federal maritime law, filed under a procedure created by Congress to resolve disputes just like this one. The district court's refusal to allow Granite State its day in federal court was error, and should be reversed.

"[F]ederal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred . . . [and] have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution." *New Orleans Pub. Serv., Inc. v. New Orleans*, 491 U.S. 350, 358, 109 S.Ct. 2506, 2512, 105 L.Ed.2d 298, 310 (1989) (quoting *Cohens v. Virginia*, 6 Wheat. 264, 404, 5 L.Ed. 257 (1821)). The central question in this appeal is whether a district court may defer to a later-filed state court action, simply because the state court has equal authority to resolve the issues presented. Granite State properly invoked federal jurisdiction, seeking a remedy affirmatively guaranteed by Congress in the Declaratory Judgment Act ("the Act"). The lower courts have denied Granite State both its right to be in federal court, and the remedy which Congress has affirmatively supplied, ignoring legislative intent, and violating the constitutionally mandated separation of powers between the legislature and the judiciary.

The Declaratory Judgment Act is intended to permit litigants an opportunity for judicial intervention before uncertainty regarding rights and obligations escalates into an affirmative breach of duty. Neither the Act itself, nor anything in its legislative history, permits a court having jurisdiction over the parties and issues to decline to hear a declaratory judgment suit. The district court's decision to defer to a parallel state court action violates the purpose of the Act, and the clear intent of its framers.

District courts have certainly not been afforded discretion to decline declaratory judgment cases, merely because it is more convenient to do so. The history of the Act, and its remedial nature, require federal courts to provide litigants their day in court. At the end of the day, if the declaratory relief will not resolve the controversy, district courts may decline to order the requested relief. If a federal court has valid jurisdiction over a declaratory judgment case, that jurisdiction must be exercised. Any other result would permit the judicial usurpation of the legislative prerogative, and unconstitutionally infringe on the legislative branch.

If district courts are permitted any discretion under the Act, that discretion can only be exercised in light of the court's unflagging obligation to exercise jurisdiction. Only exceptional circumstances will justify abdication of valid jurisdiction. *See Deakins v. Monaghan*, 484 U.S. 193, 203, 108 S.Ct. 523, 530, 98 L.Ed.2d 529, 540 (1988) (quotations omitted); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 237-39, 104 S.Ct. 2321, 2327-28, 81 L.Ed.2d 186, 195-96 (1984); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 19, 103 S.Ct. 927, 938, 74 L.Ed.2d 765, 782 (1983); *Colorado River Water Conservation Dist. v.*

United States, 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483, 495-96 (1976); *County of Allegheny v. Frank Mashuda Corp.*, 360 U.S. 185, 188-89, 79 S.Ct. 1060, 1062-63, 3 L.Ed.2d 1163, 1166 (1959).

Neither the invocation of an affirmative federal remedy nor the pendency of a state court proceeding is an exceptional circumstance that justifies the abdication of valid federal jurisdiction. In fact the opposite is true. Abstention merely because Granite State can be sued in state court creates a precedent that extends far beyond the facts of this case, depriving litigants of a right and a remedy guaranteed by Congress: the right to seek resolution of claims in a neutral federal forum. Abstention because Granite State invoked a legislatively sanctioned remedy in the Declaratory Judgment Act unconstitutionally usurps the legislative prerogative, and judicially repeals the Act itself. While exceptional circumstances might constitutionally justify abdication of the unflagging obligation to exercise jurisdiction, the judiciary may not eviscerate an affirmative remedy solely because it is more convenient to do so. Unless exceptional circumstances are present – and none were identified by the district court – abstention from a declaratory judgment action cannot be permitted. Such a result violates the separation of powers doctrine embodied in the United States Constitution. U.S. CONST. arts I-III.

The decision to abstain, though based on the facts of a particular case, is a purely legal determination. Review of that decision, therefore, must be based on a searching examination *de novo*. Moreover, the importance of federalism and comity concerns require a searching review from the courts of appeals. *See Brillhart v. Excess Ins. Co.*, 316

U.S. 491, 494, 62 S.Ct. 1173, 1175, 86 L.Ed. 1620, 1625 (1942). A district court cannot be permitted unfettered discretion to abrogate its responsibility to decide cases that are clearly within federal jurisdiction. *Moses Cone*, 460 U.S. at 19, 103 S.Ct. at 938. Furthermore, deference to a later-filed state court action elevates comity over federalism, ignoring the affirmative nature of the remedy provided by Congress.

The district court failed to consider governing law, and completely failed to weigh all abstention factors in light of the unflagging obligation to exercise jurisdiction. The Fifth Circuit's deference to the unfettered discretion of the district court has effectively obliterated a legislatively crafted remedy for Granite State in particular, and for insurers in general. The district court's "second in time preference" eliminates the efficacy of the Declaratory Judgment Act and penalizes any litigant who attempts to avail itself of the protections of the Declaratory Judgment Act before a dispute ripens into litigation. The district court below had clear and unquestioned jurisdiction over Granite State's declaratory judgment action. Abstention in favor of a later-filed state court action can be justified, if at all, only in extraordinary circumstances. The courts below identified no extraordinary circumstances, because none exist. This case should be remanded to provide Granite State its day in federal court.

ARGUMENT

I. A federal court with valid jurisdiction may not defer to a later-filed state court action, merely because of the pendency of the state court action.

This case presents the Court with the opportunity to resolve conclusively what has become an increasingly tangled web of confusing and conflicting decisions issued by the circuit courts. In clear conflict with the majority of circuits which have addressed this issue,[6] the Fifth Circuit has given district courts discretion to dismiss matters validly before the federal court, solely for the sake of convenience, if a state forum is available and competent to resolve the issues presented. If a district court has virtually unfettered discretion to stay an action properly within its jurisdiction, solely because a parallel action has been filed in a state court having concurrent jurisdiction, then the only way Congress can assure a litigant the right to choose a federal forum is to grant federal courts *exclusive* jurisdiction. The Fifth Circuit's ruling eviscerates the affirmative remedy provided by Congress in the Declaratory Judgment Act and ignores the clear congressional intent to provide litigants with a neutral federal forum to

[6] *See Villa Marina Yacht Sales v. Hatteras Yachts*, 915 F.2d 7, 13 (CA1 1990); *General Reinsurance Corp. v. Ciba-Geigy Corp.*, 853 F.2d 78, 81 (CA2 1988); *GEICO v. Simon*, 917 F.2d 1144, 1147-49 (CA8 1990); *University of Maryland v. Peat Marwick Main & Co.*, 923 F.2d 265, 271 (CA3 1991); *Heitmanis v. Austin*, 899 F.2d 521, 527 (CA6 1990); *Life-Link Int'l, Inc. v. Lalla*, 902 F.2d 1493, 1495 (CA10 1990); *American Mfrs. Mut. Ins. v. Edward D. Stone, Jr.*, 743 F.2d 1519, 1525 (CA11 1984). *But see Continental Casualty Co. v. Robsac Indus., Inc.*, 947 F.2d 1367, 1370 (CA9 1991).

resolve issues such as those presented here. The decision below should be reversed.

A. Deference to a later-filed state court action is contrary to congressional intent and the affirmative character of the Declaratory Judgment Act.

The courts below held that the exercise of jurisdiction under the Declaratory Judgment Act is discretionary. That was error. The legislative history of the Act makes it clear that federal courts have no discretion to decline to hear a Declaratory Judgment action, but must allow litigants an opportunity to be heard. *See* S. Rep. No. 1005, 73d Cong., 2d Sess., at 5-6 (1934); H.R. Rep. No. 1264, 73d Cong., 2d Sess., at 2 (1934). Deference in favor of a later-filed state court action is contrary to the affirmative intent of the Act, and the clear dictates of the framers of the statute. District courts *must* hear Declaratory Judgment cases; district courts *may* decline to enter the requested relief. Granite State is entitled to its day in court, and the opportunity to present its case in a neutral federal forum. *See* H.R. Rep. No. 627, 72d Cong., 1st Sess., at 2 (1932). The decision of the Fifth Circuit should be reversed, with instructions to vacate the district court's stay order.

The right of a declaratory judgment petitioner to have its day in court is absolute. "[W]hen a petitioner seeks a mild instead of a drastic remedy as adequate to his needs, *no court should deny it* unless it thinks the relief insufficient to the purpose of the suit. It should make no difference to a court through which door a petitioner

enters the court room, so long as he is properly there and the court is in a position to grant relief." EDWIN BORCHARD, DECLARATORY JUDGMENTS xi (2d ed. 1941) (emphasis added).[7] Once the litigants have been fully heard, then, and only then, does a district court have discretion to refuse to issue the relief sought, because it will not terminate the controversy or serve a useful purpose. *Id. See also* S. Rep. No. 1005, 73d Cong., 2d Sess., at 2, 5 (1934).

As visualized by its framers, the Declaratory Judgment Act was intended to be a progressive, affirmative protection for "the perplexed and insecure citizen," specifically in insurance disputes. EDWIN BORCHARD, DECLARATORY JUDGMENTS vii, 634-80 (2d ed. 1941). To effectuate this intent, district courts must give declaratory judgment litigants their day in court. Litigants have a right to maintain a suit under the Act to secure a judgment determining the obligations and liabilities of the parties. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 243-44, 57 S.Ct. 461, 465, 81 L.Ed. 617, 622-23 (1937).

Deference to a later-filed state court action, simply because another forum is available, is inconsistent with the affirmative, remedial character of the right granted by Congress. Congress has not given district courts discretion to dismiss cases, merely because it is more convenient to do so. Rather, district courts have discretion to grant the relief sought, or to deny the relief sought,

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[7] Professor Borchard, one of the earliest proponents of declaratory judgments, testified before the Senate Judiciary Committee in support of the passage of the Declaratory Judgment Act. S. Rep. No. 1005, 73d Cong., 2d Sess., at 2 (1934).

following a full trial on the merits. *See* S. Rep. No. 1005, 73d Cong., 2d Sess., at 2, 5 (1934).

Granite State, unsure of its rights and duties under its policy of marine cargo insurance, invoked the affirmative protection of the federal court. The district court's decision to stay, pending resolution of the later-filed state court action, has eviscerated the affirmative nature of the remedy provided to Granite State by Congress. The district court has effectively abolished the Declaratory Judgment Act, leaving Granite State without a federal remedy. The stay order must be vacated and Granite State permitted to proceed to trial.

B. Traditional abstention doctrine does not permit the abdication of jurisdiction over a declaratory judgment action merely because of the pendency of a parallel state court action.

The decisions of *Brillhart v. Excess Insurance Co.*, 316 U.S. 491, 62 S.Ct. 1173, 86 L.Ed. 1620 (1942), *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), and *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983), reinforced by this Court's recent decisions in *McCarthy v. Madigan*, ___ U.S. ___, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992), and *New Orleans Public Service, Inc. v. New Orleans*, 491 U.S. 350, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989), command a district court with valid jurisdiction to exercise that jurisdiction in declaratory judgment cases, except in the most exceptional circumstances. The mere pendency of a state court action is not sufficient.

Throughout the last fifty years, this Court has refined the abstention doctrine as it presents itself in various postures. Beginning with *Railroad Comm'n of Texas v. Pullman*, 312 U.S. 496, 61 S.Ct. 643, 84 L.Ed. 971 (1941), continuing with *Brillhart* and *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), the Court addressed the comity problems that arise when federal courts and state courts have concurrent, parallel jurisdiction over pending matters. These cases held that where important issues of state law are present, it may be appropriate for a federal court to stay its hand and allow the state courts to resolve issues of state law. *See also Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

Where issues of federal law are present, however, and an affirmative federal remedy has been invoked, these traditional abstention doctrines do not permit a federal court to decline jurisdiction merely because of the pendency of a state court action. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). *Colorado River* presented a situation involving parallel state and federal actions, but no important issues of state law. The McCarran Act[8]

[8] The McCarran Amendment remains essentially the same. The present version provides: "consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit." 43 U.S.C. § 666 (1988).

provides state and federal courts with concurrent jurisdiction over water rights disputes on federal lands. The United States filed suit in federal court to adjudicate water rights on an Indian reservation. Shortly thereafter, a defendant sought to make the government a party to an action in a state water district, seeking to adjudicate the same water rights under the state regulatory scheme. The district court dismissed the government's suit on abstention grounds; the court of appeals reversed.

In reviewing the decision of the court of appeals, this Court canvassed existing manifestations of the abstention doctrine[9] and concluded that none of the three existing forms of abstention were applicable. Nonetheless, this Court reinstated the dismissal order under a new doctrine, by which a district court, in the interests of "wise judicial administration," could dismiss or stay a federal action in deference to a parallel state action. 424 U.S. at 817-18, 96 S.Ct. at 1246. This is, essentially, a doctrine of convenience for the federal courts. *See* Linda Mullenix, *A Branch Too Far: Pruning the Abstention Doctrine*, 75 GEO. L.J. 99 (1986). *"Colorado River"* abstention, while similar in practice to the existing abstention doctrines, is appropriate "in considerably more limited [circumstances] than the circumstances appropriate for abstention. [*Colorado River* abstention] circumstances, though exceptional, do nevertheless exist." *Colorado River*, 424 U.S. at 818, 96 S.Ct. at 1246.

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[9] *Railroad Comm'n of Texas v. Pullman*, 312 U.S. 496, 61 S.Ct. 643, 84 L.Ed. 971 (1941); *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1942); *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

Colorado River then identified some exceptional circumstances in which this type of abstention would be appropriate. (i) The court which first assumes jurisdiction over real property may exercise that jurisdiction to the exclusion of other courts. 424 U.S. at 818, 96 S.Ct. at 1246. (ii) Extreme inconvenience of the federal forum is another consideration that may argue in favor of this type of abstention. (iii) The desirability of avoiding piecemeal adjudications may support abstention; and (iv) the court may consider the order in which jurisdiction was obtained. 424 U.S. at 818, 96 S.Ct. at 1247. "No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counseling against that exercise is required. *Only the clearest of justifications will warrant dismissal.*" 424 U.S. at 818-19, 96 S.Ct. at 1247 (emphasis added) (citations omitted).

These factors were expanded to six by *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). Again emphasizing the "unflagging obligation" to exercise jurisdiction, and that only the clearest of justifications would warrant abdicating that jurisdiction, *Moses Cone* added to the abstention equation (v) choice of law, and (vi) inadequacy of the state court proceeding. 460 U.S. at 26, 28, 103 S.Ct. at 942-43.

Moses Cone was a declaratory judgment suit filed in federal court, seeking an order compelling arbitration of a contract dispute. The federal court action was the second-filed action, coming on the heels of a declaratory judgment action in state court. Both cases involved the identical issue of whether the claims presented should be

arbitrated. The district court stayed the federal declaratory judgment action pending resolution of the Hospital's state court suit because the issues were identical. 460 U.S. at 7, 103 S.Ct. at 932. The Fourth Circuit reversed and remanded with instructions to enter an order to arbitrate.

In addressing the propriety of the district court's stay order, this Court looked first to the "persuasive guidance" of *Colorado River*. 460 U.S. at 13, 103 S.Ct. at 935. After discussing *Colorado River*, and the new form of "abstention" it created, this Court determined that the *Colorado River* "exceptional circumstances" test provided the standard against which to review the district court's exercise of discretion in a federal declaratory judgment action. 460 U.S. at 19, 103 S.Ct. at 938.

Moses Cone makes it clear that declaratory judgment actions must be viewed with the same unflagging obligation to exercise jurisdiction as is required with all other types of actions validly within federal jurisdiction. If a district court is ever permitted to stay its hand, pending resolution by a parallel forum, a decision to stay must be made within the limits prescribed by *Colorado River* and *Moses Cone*. *See also New Orleans Pub. Serv., Inc. v. New Orleans*, 491 U.S. 350, 109 S.Ct. 2506, 105 L.Ed.2d 198 (1989) ("NOPSI") (reversing abstention decision where declaratory relief sought under federal law). Specifically addressing the issue of parallel actions in the state and federal systems, *NOPSI* recognized that while the federal court's disposition of an action may affect or pre-empt a pending state action, "there is no doctrine that the availability or even the pendency of state judicial proceedings excludes the federal courts." 491 U.S. at 373, 109 S.Ct. at 2520.

If district courts are permitted under any circumstances to stay declaratory judgment cases, the decision must be made in light of the unflagging obligation to exercise jurisdiction, which cannot be abdicated absent exceptional circumstances. The mere pendency of a state court action is not an exceptional circumstance, but is a foregone conclusion in *Colorado River* abstention cases. Jurisdiction must be exercised in this declaratory judgment case.

C. Unless exceptional circumstances exist, *Colorado River* abstention violates the United States Constitution.

Colorado River abstention is essentially a doctrine of convenience. *See* Linda Mullenix, *A Branch Too Far*, 75 Geo. L.J. at 103. While this Court has affirmed the application of *Colorado River* abstention in certain circumstances, this type of abstention is not based on the same comity principles at stake in traditional abstention cases, which involve complex state regulatory schemes, or untested state court statutes. *Colorado River* abstention is concerned with "wise judicial administration;" in other words, management of the district court's docket. This type of abstention always involves parallel litigation, in which one party desires a neutral federal forum, and the other party seeks a favorable state court forum.

Federal jurisdiction is not discretionary. The Constitution has provided a federal forum for cases involving maritime disputes, and for cases involving disputes between citizens of different states. U.S. Const. art. III, § 1. Maritime jurisdiction insures uniform application of

maritime commerce regulations. Diversity jurisdiction provides a neutral forum to an out-of-state defendant, free from the local and political pressures which might affect state courts. CHARLES A. WRIGHT, LAW OF THE FEDERAL COURTS § 23, at 127-30 (1983). In the Declaratory Judgment Act, Congress has provided litigants with an affirmative remedy; a remedy that by its very nature invites proactive, pre-emptive litigation.

A decision to abstain under *Colorado River* because of the pendency of a later-filed parallel state court action, except in the most exceptional of circumstances, thwarts the legislative purpose behind the jurisdiction statutes and the Declaratory Judgment Act. Granite State, although invoking a legislatively sanctioned federal remedy, is forced to try its federal maritime claims in a state court. Respondents do not allege that the jurisdictional statutes invoked were improper or unconstitutional. Likewise, there is no indication that the Declaratory Judgment Act itself is improper or unconstitutional. Both the constitutionality of the Act and its numerous benefits to all classes of litigants are long-established. *See generally* EDWIN BORCHARD, DECLARATORY JUDGMENTS (2d ed. 1941). Nonetheless, the district court's decision to abstain has abolished both Granite State's right and remedy. This judicial usurpation of the legislative function cannot be tolerated, if at all, absent the most exceptional circumstances.

D. The clear mandates of Congress and this Court direct federal district courts to exercise their valid jurisdiction, and resolve declaratory judgment cases, absent exceptional circumstances.

Over the last fifty years, this Court has refined the judicial doctrine of abstention as it presents itself in various manifestations. Throughout its history, the abstention doctrine has been "grounded firmly in considerations of comity and the maintenance of appropriate state-federal relations. . . . [T]he Court's concern for the maintenance of appropriate state court relations furnishes the underlying rationale for abstention." David Sonnenshein, *Abstention: The Crooked Course of Colorado River*, 59 TUL. L. REV. 651, 655-57 (1984). In almost every case involving parallel litigation, this Court has emphasized the "virtually unflagging obligation" to exercise jurisdiction, absent extraordinary circumstances. *See McCarthy v. Madigan*, ___ U.S. ___, 112 S.Ct. 1081, 1087, 117 L.Ed.2d 291 (1992); *NOPSI*, 491 U.S. at 359, 109 S.Ct. at 2513; *Deakins v. Monaghan*, 484 U.S. 193, 203, 108 S.Ct. 523, 530, 98 L.Ed.2d 529, 540 (1987); *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571, 103 S.Ct. 3201, 3216, 77 L.Ed.2d 837, 859 (1983). Traditional abstention doctrine addresses grave concerns of federalism and comity. If a district court is ever permitted to abstain in a declaratory judgment action in deference to a state court, it can only do so where exceptional circumstances exist.

State courts have no particular comity interest in resolving a federal maritime dispute between two international companies over a loss which occurred in Korea.

The comity concerns which validate traditional abstention decisions are not present here. Absent a strong state interest in resolving a particular dispute, there is no justification for a federal court to stay its hand and permit a state forum to resolve issues first presented to the federal court, involving issues of maritime law. The remedial nature of the Declaratory Judgment Act requires federal courts to provide litigants an opportunity to present their case in a neutral federal forum.

If a federal court is ever permitted to decline a case, validly within federal jurisdiction, the importance of both federalism and comity concerns require that district courts engage in a careful analysis of the factors set out by this Court in *Colorado River* and *Moses Cone*. Most specifically, district courts must consider their unflagging obligation to exercise jurisdiction, and the affirmative nature of the declaratory remedy. The availability of a state forum is not an exceptional circumstance, and the district court identified no other reason for abstention. The district court below had unquestioned jurisdiction, and Granite State validly invoked an affirmative federal remedy in the Declaratory Judgment Act. The failure of the lower courts to analyze this case within the context of this Court's mandate that the exercise of jurisdiction is unflagging, requires reversal.

II. The importance of the comity and federalism issues presented by declaratory judgment abstentions requires *de novo* review by appellate courts.

The Fifth Circuit's decision to defer to the unfettered discretion of district courts eviscerates the affirmative

remedy provided by the Declaratory Judgment Act, in contravention of the express dictates of Congress, and in violation of the separation of powers doctrine embodied in the United States Constitution, and forever disables insurers from obtaining declaratory relief in federal courts. *See Continental Casualty Co. v. Robsac Indus.*, 947 F.2d 1367, 1377 (Hall, J., dissenting). The Fifth Circuit, in accord with the Second Circuit, has held that "the district court's handling of the declaratory judgment complaint is reviewed for abuse of discretion." (Pet. for Cert. App. B-4). *See General Reinsurance Corp. v. Ciba-Geigy Corp.*, 853 F.2d 78, 81 (CA2 1988).

This deferential review conflicts with decisions of the majority of circuits that have addressed this issue,[10] and effectively obliterates the affirmative remedy provided by Congress in the Declaratory Judgment Act. The importance of the comity and federalism issues presented by abstention cases requires that the exercise of discretion by district courts be carefully scrutinized on appeal. *See, e.g., Cincinnati Ins. v. Holbrook*, 867 F.2d 1330, 1333 (CA11 1989); 6A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶57.08[2] (2d ed. 1992). Furthermore, the abstention doctrine, unless carefully executed, infringes on the legislative process granted by the Constitution exclusively to the legislative branch. U.S. CONST. art. I, § 1 District

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[10] *See Continental Casualty Co. v. Robsac Indus.*, 947 F.2d 1367, 1370 (CA9 1991); *Allstate Ins. Co. v. Mercier*, 913 F.2d 273, 277 (CA6 1990); *Cincinnati Ins. v. Holbrook*, 867 F.2d 1330, 1333 (CA11 1989); *International Harvester Co. v. Deere & Co.*, 623 F.2d 1207, 1217 (CA7 1980); *Hanes Corp v. Millard*, 531 F.2d 585, 591 (CADC 1976); *see also GEICO v. Simon*, 917 F.2d 1144, 1147-49 (CA8 1990).

courts cannot be given unfettered discretion to ignore the clear dictates of Congress. The Fifth Circuit's failure to review searchingly the district court's decision requires reversal.

The Fifth Circuit has permitted district courts to decline to hear any matter that is within the concurrent jurisdiction of both state and federal courts, merely because the state court could more conveniently resolve issues presented. The precedent set by the court of appeals has far-reaching applications to admiralty matters, diversity cases, civil rights suits and any other matter that falls within the concurrent jurisdiction of state and federal courts, and has completely disenfranchised insurers from federal relief. *See Continental Casualty*, 947 F.2d at 1377 (Hall, J., dissenting).

If district courts have the broad discretion allowed by the Fifth Circuit, there is no end to the types of cases which can be dismissed because of a pending state court matter. A validly removed suit could be dismissed, because the plaintiff refiles the same lawsuit in state court, adding a non-diverse defendant to defeat removal. Under the Fifth Circuit's rule, the federal lawsuit could be stayed, pending resolution of the state court action. *See* Rex E. Lee & Richard G. Wilkins, *An Analysis of Supplemental Jurisdiction and Abstention with Recommendation for Legislative Action*, 1990 B.Y.U. L. Rev. 321, 371. This result, totally defeating federal jurisdiction, would be permitted in the Fifth Circuit. This cannot be the intent of Congress in providing both jurisdiction and affirmative relief.

While the Declaratory Judgment Act vests federal courts with discretion,[11] "such discretion must be exercised under the relevant standard prescribed by this Court." *Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 19, 103 S.Ct. 927, 938, 74 L.Ed.2d 765, 782 (1983). "The right of a party plaintiff to choose a federal court where there is a choice cannot properly be denied." *NOPSI*, 491 U.S. at 359, 109 S.Ct. at 2513 (citations omitted). The Fifth Circuit's deferential review conflicts with this Court's mandate that federal courts have a virtually unflagging obligation to exercise congressionally mandated jurisdiction. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 96 S.Ct. 1236, 1246, 47 L.Ed.2d 483, 498 (1976). Abstention decisions must be given searching review if they are not to "make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States." *NOPSI*, 491 U.S. at 368, 109 S.Ct. at 2518 (citing, *inter alia*, *Colorado River*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483).

The separation of powers doctrine requires the judicial branch of the federal government to give due deference to the clear dictates of the legislative branch. *See Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 319-20, 105 S.Ct. 3180, 3188, 87 L.Ed.2d 220, 232 (1985). As dictated by the Constitution, the legislature enacts statutes and regulations. The judiciary enforces

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[11] [A]ny court . . . *may* declare the rights and other legal relations. . . . " 28 U.S.C. § 2201(a) (1988) (emphasis added).

those rules and regulations within the limits of the Constitution and pursuant to the jurisdiction given by Congress. Because the courts are required to exercise their jurisdiction, a doctrine which permits district courts unfettered discretion is "treason to the Constitution." *See NOPSI*, 491 U.S. at 358, 109 S.Ct. at 2512. District courts may not cavalierly cast aside their responsibility to resolve matters within their jurisdiction. The decision of the Fifth Circuit must be reversed, with appropriate instructions for adequate analysis of these important issues of comity and federalism.

III A searching review of the *Colorado River/Moses Cone* factors reveals no exceptional circumstances and mandates the exercise of jurisdiction.

Neither the district court nor the Fifth Circuit identified any exceptional circumstances that would justify deference to the parallel state proceeding – nor did either court address the critical choice of law issue. Furthermore, the district court failed to weigh any factors in light of the unflagging obligation to exercise jurisdiction. Had the district court engaged in the correct analysis, it could not have concluded that a stay order was appropriate. The district court's factual analysis was erroneous and its ultimate conclusion untenable as a matter of law. The decision below should be reversed, and this case remanded with instructions to vacate the stay.

A. Because this case does not involve real property, the first *Colorado River* factor directs the exercise of jurisdiction.

The first *Colorado River* factor, jurisdiction over real property, is not an issue in this case. The task of a federal court is "not to find some substantial reason for the *exercise* of federal jurisdiction by the district court; rather the task is to ascertain whether there exist 'exceptional circumstances,' the 'clearest of justifications,' that can suffice under *Colorado River* to justify the *surrender* of that jurisdiction." *Moses Cone*, 460 U.S. at 25-26, 103 S.Ct. at 942. In other words, the absence of a factor, such as jurisdiction over property, supports the exercise of jurisdiction, rather than the declination of jurisdiction. Because Granite State and Tandy are not disputing real property, the first abstention factor directs the exercise of federal jurisdiction.

B. Because minimal inconvenience does not justify abdication of jurisdiction in favor of a parallel state action, the second *Colorado River* factor directs the exercise of jurisdiction.

The second *Colorado River* factor concerns the convenience of the respective forums. 424 U.S. at 818, 103 S.Ct. at 1247. A heavy burden is placed on parties seeking dismissal for convenience sake. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed.2d 1055 (1947); *see also* David Sonnenshein, *Abstention: The Crooked Course of Colorado River*, 59 Tul. L. Rev. 651, 695 (1984). Minimal inconvenience is not an "exceptional circumstance."

Granite State is a New Hampshire corporation with its principal place of business also in New Hampshire. (J.A. 4, 108). Tandy is a Delaware corporation with its principal place of business in Fort Worth, Texas. (J.A. 4, 108). T.C. Electronics (Korea) Ltd. is a Korean corporation with its principal place of business in Masan, Korea. (J.A. 4, 108). The insurance policy covered the world-wide transportation of goods. The loss claimed by Tandy took place in Korea. The underwriting communications were between offices in Houston, Dallas and Fort Worth. While there are some witnesses in Fort Worth with material information, there are equal numbers of witnesses in California, New York, Houston, Dallas and the Far East. Tandy's counsel has an office in Houston; Granite State's counsel maintains a branch office in Dallas. Houston and Dallas-Fort Worth are major cities with more than adequate airline service.[12] *See Colorado River*, 424 U.S. at 823-24 n.6, 96 S.Ct. at 1249-50 n.6 (Stewart, J., dissenting).

Because Fort Worth and Houston are equally convenient to two multi-national corporations having a dispute over events which took place in Korea, convenience factors in this multi-national dispute do not justify abstention. The second abstention factor directs the exercise of jurisdiction.

[12] In fact, the Official Airline Guide shows in excess of fifty flights per day between Dallas-Fort Worth and Houston, and Southwest Airlines offers flights between Dallas and Houston every fifteen minutes during peak hours.

C. The third *Colorado River* factor directs the exercise of jurisdiction to vindicate the affirmative federal policy of the Declaratory Judgment Act.

The third *Colorado River* factor concerns the avoidance of piecemeal litigation. Duplicative litigation is an ever-present problem in a dual judicial system and, by definition, is always present in a *Colorado River* abstention case. *See, e.g., Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 559-60, 103 S.Ct. 3201, 3210, 77 L.Ed.2d 837 (1983). The pendency of a state court action alone does not bar concurrent proceedings in a federal court. *NOPSI*, 491 U.S. at 373, 109 S.Ct. at 2520; *see also Colorado River*, 424 U.S. at 817, 96 S.Ct. at 1246. *Colorado River's* concern was not duplicative litigation, but piecemeal adjudication, in more than one court, of a concrete, finite *res:* water in the Colorado River. That concern is not present in this litigation.

Piecemeal adjudication may be required, however, where necessary to effectuate legislative policy. *Moses Cone*, 460 U.S. at 20, 103 S.Ct. at 939. In *Moses Cone*, this Court described the anomalous nature of the Federal Arbitration Act, which, while not creating independent federal-question jurisdiction, represented an important federal policy "to be vindicated by the federal courts where otherwise appropriate." 460 U.S. at 25 n.32, 103 S.Ct. at 942 n.32.

The Declaratory Judgment Act evinces a similar federal policy, to be vindicated wherever possible. While the Act cannot be used absent affirmative federal jurisdiction,

where jurisdiction is present, the Act expresses a congressional policy that cannot be denied. Declaratory judgment claims brought in federal court must be allowed to continue.

Furthermore, Granite State's dispute with Tandy can be severed from the remainder of Tandy's state court litigation, resolving this problem without the necessity of a stay. *See Moses Cone*, 460 U.S. at 21, 103 S.Ct. at 939. Granite State sued Tandy as one principal against another, each of which is responsible for the errors of its own agents. In its state court action, Tandy has sued six different parties, including agents of both Tandy and Granite State, Tandy's property insurer, and Tandy's prior cargo insurer. Granite State can completely resolve its concerns regarding the validity of the Granite State insurance policy in this federal litigation, and can do so quickly and expeditiously without the confusion and complication associated with five other parties.[13]

As a practical matter, following resolution of the state action, principles of *res judicata* and collateral estoppel will preclude relitigation of factual issues. The issues of federal law that Granite State sought to have adjudicated by a neutral federal court will conclusively be determined by the state court. *See Will v. Calvert*, 437 U.S. 655, 675-76, 98 S.Ct. 2552, 2563-69, 57 L.Ed.2d 504, 519-20 (1978)

[13] As this case presently stands, Tandy cannot fully resolve its own complaints in this federal litigation. However, there is nothing to prevent Tandy from filing third party complaints against the other parties, thereby consolidating all issues in the federal action. *See* 28 U.S.C. § 1367(a) (Supp. II 1990).

(Brennan J., dissenting); *see also* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 96, 97 (1984). This Court has noted its "fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court . . . can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims." *England v. Louisiana Bd. of Medical Examiners*, 375 U.S. 411, 415, 84 S.Ct. 461, 464, 11 L.Ed.2d 440, 444-45 (1964) (*Pullman* abstention).

The Declaratory Judgment Act represents an affirmative federal policy of providing access to a neutral federal forum for the adjudication of claims within federal jurisdiction. In order to vindicate this policy, and permit Granite State its federal forum, the third abstention factor directs the exercise of jurisdiction.

D. Because Granite State filed its action first, exercising its pre-emptive prerogative under the Declaratory Judgment Act, the fourth *Colorado River* factor directs the exercise of jurisdiction.

The fourth *Colorado River* factor, order of filing, supports federal resolution of this dispute. Granite State filed its declaratory judgment action first. The district court turned this factor on its head and held that Granite State improperly "raced" to the courthouse. The district court's conclusion is wrong for two reasons. Granite State did not commence its action until nearly two years after Tandy's loss began with the occupation of its premises, and over a year after the riot at Masan. Nonetheless,

according to the district court, this factor all but mandated deference to the state court proceeding. (Pet. for Cert. App. C-9).

Second, and more basically, the whole purpose of allowing declaratory judgment actions is to permit parties to have their rights and remedies determined by a court *before* taking action. That is not a "race"; it is the deliberate choice Congress has allowed parties to a dispute.

The diversity statute was enacted to provide litigants with an alternative to the perceived hometown bias of state courts. CHARLES A. WRIGHT, LAW OF THE FEDERAL COURTS § 23, at 128 (1983). The Declaratory Judgment Act was enacted to permit a party to "pre-empt" litigation, before a dispute escalated to the point where litigation was inevitable. *Id.* § 100, at 670-71.

This case clearly demonstrates the need for both a declaratory remedy and protection from hometown bias. Tandy, one of the largest employers in Tarrant County, is seeking $110 million from a home-town jury. Granite State, as an insurance company, is already at a disadvantage. Both diversity jurisdiction and the Declaratory Judgment Act provide remedial, affirmative protections for litigants in Granite State's position. Nonetheless, Granite State finds itself jettisoned from its federal forum, forced to try its case in state court.

This cannot be the result intended by Congress. Where unquestioned federal jurisdiction exists, the Declaratory Judgment Act is designed to allow a party to invoke federal judicial intervention to determine the rights of the parties *before* another party files a lawsuit. *Id.*

The Act expresses a clear congressional intent to provide litigants access to a judicial forum to clarify their rights and duties before they must take action, in a federal forum when Congress so provides. *See* EDWIN BORCHARD, DECLARATORY JUDGMENTS xii (2d ed. 1941). Because Granite State filed suit first, the fourth abstention factor directs the exercise of jurisdiction.

E. Federal maritime law governs this matter, therefore the fifth abstention factor directs the exercise of federal jurisdiction.

The fifth abstention factor is governing law. *Moses Cone*, 460 U.S. at 23, 103 S.Ct. at 941. "[T]he presence of federal-law issues must always be a major consideration weighing against surrender." *Moses Cone*, 460 U.S. at 26, 103 S.Ct. at 942. The courts below failed to address the law governing this multi-national dispute.

Granite State contests policy validity under federal maritime law because Tandy misrepresented material facts in its application for marine insurance. (J.A. 5, 18). Granite State brought this lawsuit under the Declaratory Judgment Act, asserting jurisdiction pursuant to federal maritime law[14] and diversity.[15] Granite State seeks the construction of an ocean marine cargo insurance policy, involving world-wide transport of Tandy's goods. The policy's choice of law provision states: "All questions of liability arising under this Policy are to be governed by

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[14] 28 U.S.C. § 1333 (1988).

[15] 28 U.S.C. § 1331 (1988).

the law and customs of England, except in the United States and its possessions." (J.A. 57).

Under English law, *uberrimae fidei* is the controlling requirement in the formation of a marine insurance contract: "A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party." The Marine Insurance Act, 1906, 6 Edw., Ch. 41, § 17 (Eng.). The English statute requires that the "assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured. . . . If the assured fails to make such disclosure, the insurer may avoid the contract." *Id.* § 18.

Federal maritime law, particularly where marine insurance in concerned, follows the fortunes of English decisions, and is virtually identical to English law. *Queens Ins. Co. of America v. Globe & Rutgers Fire Ins. Co.*, 263 U.S. 487, 493, 44 S.Ct. 175, 176, 68 L.Ed. 402, 404 (1924); *Calmar S.S. Corp. v. Scott*, 345 U.S. 427, 442-43, 73 S.Ct. 739, 747, 97 L.Ed. 1125, 1138 (1953); *Puritan Ins. Co. v. Eagle S.S. Co.*, 779 F.2d 866, 870 (CA2 1985); *see also Steelmet, Inc. v. Caribe Towing Corp.*, 747 F.2d 689, 694-95 (CA11 1984), *modified*, 779 F.2d 1485 (CA11 1986); *Gulfstream Cargo, Ltd. v. Reliance Ins. Co.*, 409 F.2d 974, 980-82 (CA5 1969); *Royal Ins. Co. of America v. Cathy Daniels, Ltd.*, 684 F.Supp. 786, 790 (S.D.N.Y. 1988); *Reliance Knight v. U.S. Fire Ins. Co.*, 651 F.Supp. 477, 481 (S.D.N.Y.), *aff'd.*, 804 F.2d 9 (CA2 1986); GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 55-56 (2d ed. 1975). *But see Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 316-21, 75 S.Ct. 368, 371-74, 99 L.Ed. 337, 344-46 (1955); *Albany Ins. Co. v. Anh Thi Kiu*, 927 F.2d 882, 890 (CA5 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 279, 116 L.Ed.2d 230 (1991). Under federal maritime law the doctrine of *uberrimae fidei* controls the formation of the Granite State policy.

The presence of issues of federal law is critical to the abstention decision. *Moses Cone*, 460 U.S. at 26, 103 S.Ct. at 942. Because Granite State raised issues governed by federal maritime law, the fifth abstention factor directs the exercise of jurisdiction.

F. Because the federal court has greater expertise with the federal and international issues presented by this action, the state court cannot claim any advantage and the sixth abstention factor directs the exercise of jurisdiction.

The final factor identified in *Moses Cone* is the inadequacy of the state court proceeding. 460 U.S. at 26, 103 S.Ct. at 942. The purpose of this inquiry is "not to find some substantial reason for the *exercise* of federal jurisdiction by the district court; rather the task is to ascertain whether there exist 'exceptional circumstances,' the 'clearest of justifications,' that can suffice under *Colorado River* to justify the *surrender* of that jurisdiction." *Moses Cone*, 460 U.S. at 25-26, 103 S.Ct. at 942. This factor does not require that the state forum be *in*adequate, in order to exercise jurisdiction, for an inadequate state forum *mandates* the exercise of federal jurisdiction. 460 U.S. at 26, 103 S.Ct. at 942. Because state court competence and procedures are presumed adequate, an adequate state forum is not an "exceptional circumstance" mandating surrender of jurisdiction. *See Deakins v. Monaghan*, 484

U.S. 193, 203, 108 S.Ct. 523, 530, 98 L.Ed.2d 529, 540-41 (1988); *Stone v. Powell*, 428 U.S. 465, 493-94 n.35, 96 S.Ct. 3037, 3052 n.35, 49 L.Ed.2d 1067, 1087 n.35 (1976); *see also* Akhil R. Amar, *Parity as a Constitutional Question*, 71 B.U. L. Rev. 645, 646 (1991); Erwin Chemerinsky, Comment, *Ending the Parity Debate*, 71 B.U. L. Rev. 593, 602-03 (1991). Unless the state court is affirmately inadequate, in which case jurisdiction is mandated, this factor does not even enter the abstention balance.

However, the local bias concerns that resulted in the enactment of the diversity jurisdiction statute are present here, and indicate the importance of a neutral federal forum. *See* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 Yale L. J. 71, 75 n.15 (1984). Tandy filed its state court action in Tarrant County, a county in which Tandy is one of the largest employers, and the county in which Tandy maintains its principal place of business. Unlike life-tenured federal judges, the state judge hearing these issues will have to stand for re-election, in a community in which Tandy exercises a great deal of influence.

In addition, the applicability of federal maritime law is also relevant. "[F]ederal courts have developed a vast expertise in dealing with the intricacies of federal law, while the state judiciary has, quite naturally, devoted the bulk of its efforts to the evolution and refinement of state law and policy. It would be unreasonable to expect state judiciaries to possess a facility equal to that of the federal courts in adjudicating federal law." Martin Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 Yale L.J. 71, 75 n.15 (1984) (citations omitted). This is particularly true when the choice is

between a state court in land-locked Tarrant County, and a federal court that due to its location on the Texas Gulf Coast has a great deal of familiarity with federal maritime issues. *See* Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. Rev. 67, 90.

Finally, this case involves the probability of extensive foreign discovery, most of it in the Far East. The need to resort to international treaties governing foreign discovery indicates that state courts cannot claim any advantage over federal courts.

On balance, while state courts are capable of handling complex litigation, state court competence is not the question. Only if the state court is demonstrably *better* qualified to handle an action does this factor support abstention. If state and federal courts are equally competent, this factor does not present an exceptional circumstance justifying abstention. If, however, the federal court possesses a greater expertise with a particular area of law, or has more resources available to accommodate the special needs of the litigants, the exercise of jurisdiction is mandated. Because of the presence of issues of federal law, and the need for international discovery, the federal courts are better suited to resolve this matter. The sixth abstention factor directs the exercise of jurisdiction.

G. Because there are no exceptional circumstances which would justify surrender of jurisdiction in favor of a state forum, the district court erred as a matter of law in abstaining.

The Declaratory Judgment Act provides litigants with an affirmative federal remedy to be used before a

potential breach of contract ripens into an actual breach of contractual duty. *See Rowan Cos., Inc. v. Griffin*, 876 F.2d 26, 28 (CA5 1989); *see also* S. Rep. No. 1005, 73d Cong., 2d Sess., at 3 (1934). The Declaratory Judgment Act traditionally has been a vehicle used by insurers to avoid the potentially severe ramifications of denying an insured's claim, when valid grounds for doing so were present. *See e.g., Continental Casualty Co. v. Robsac Indus.*, 947 F.2d 1367 (CA9 1991); *Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599 (CA5 1983); *American Mfrs. Mut. Ins. v. Stone*, 743 F.2d 1519 (CA11 1984); *see also* CHARLES A. WRIGHT, LAW OF THE FEDERAL COURTS § 100, at 672 (1983); EDWIN BORCHARD, DECLARATORY JUDGMENTS 634-80 (2d ed. 1941).

This case illustrates perfectly the "Catch 22" situation in which insurers find themselves. Granite State's investigation revealed numerous coverage questions. Tandy failed to disclose that the insured property was in the control of striking workers, affirmatively stated that no losses had occurred, and then refused to produce evidence of the value of the lost or damaged property. Once Tandy presented Granite State with an unsupported claim, Granite State had three options: (i) decline coverage and face the inevitable bad-faith lawsuit in a Texas state court, (ii) abandon its rights under the policy and pay $10 million without question, or (iii) seek a declaratory judgment. Despite opting for the prudent course of seeking a declaration of rights under the policy, Granite State now finds itself without its congressionally gra ed federal remedy, defending against a $110 million claim in Texas state court.

The district court identified no exceptional circumstance which would justify abstention. The affirmative

nature of the remedy provided by Congress, coupled with the applicability of maritime law, and the absence of any exceptional circumstances, requires the federal court to give Granite State an opportunity to be heard. This matter should be remanded for trial.

CONCLUSION

The decisions below should be reversed, and this case remanded to the Fifth Circuit with instructions to vacate the district court's stay order.

Respectfully submitted,

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Counsel for Petitioner

*Counsel of Record

(4)

No. 91-2086

In The

Supreme Court of the United States

October Term, 1992

GRANITE STATE INSURANCE COMPANY,

Petitioner,

vs.

TANDY CORPORATION and
T.C. ELECTRONICS (KOREA) LTD.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed June 26, 1992
Certiorari Granted October 5, 1992

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964

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INDEX

U.S. DISTRICT COURT
TXS - SOUTHERN DISTRICT OF TEXAS (HOUSTON)
CIVIL DOCKET FOR CASE #: 91-CV-213

Filed: 1/25/91

Granite State Ins Co v. Tandy Corp, et al
Assigned to: Judge David Hittner
Demand: $0,000
Lead Docket: None
Dkt# in other court: none

Nature of Suit: 120
Jurisdiction: Federal Question

Cause: 28:1333 Admiralty

GRANITE STATE INSURANCE COMPANY plaintiff v.	Theodore G Dimitry [COR LD NTC] Vinson & Elkins 1001 Fannin Ste 2501 Houston, TX 77002-6760 713-758-2296
TANDY CORPORATION defendant	John D White [COR LD NTC] Winstead Sechrest & Minick 910 Travis Ste 1700 Houston, TX 77002 713-650-2722
T C ELECTRONICS, (KOREA) LTD defendant	John D White (See above) [COR LD NTC]

1/25/91	1	COMPLAINT for Declaratory Judgment, a filed; FILING FEE $120.00 RECEIPT #386435 (ad) [Entry date 01/28/91]
2/19/91	5	ANSWER to Complaint by Tandy Corp, T C Electronics (Added attorney John D White), filed. (br) [Entry date 02/20/91]
2/19/91	6	MOTION to dismiss, or in the alterr .ve Mtn f/abatement of proceedings by Tandy Corp, T C Electronics, Motion Docket Date 3/11/91 [6-1] motion, 3/11/91 [6-2] motion, filed (br) [Entry date 02/20/91]
3/22/91	9	RESPONSE by Granite State Ins Co in opposition to [6-1] motion to dismiss, [6-2] motion Mtn f/abatement of proceedings, filed (br) [Entry date 03/27/91]
4/4/91	11	REPLY by T C Electronics to response to [6-1] motion to dismiss, filed (br) [Entry date 04/05/91]
4/19/91	14	SUMMARY OF DEFTS REPLY by Tandy Corp, T C Electronics to Granite State Insurance company's response to [6-1] motion to dismiss, filed (pv) [Entry date 04/22/91]
4/19/91	15	RESPONSE by Granite State Ins Co to [14-1] Defts Reply to Pltfs response to Motion to dismiss, filed (pv) [Entry date 04/22/91]
4/30/91	18	ORDER granting [6-2] motion Mtn f/abatement of proceedings, entered; Parties notified. (signed by Judge David Hittner) (br) [Entry date 05/01/91]

IN THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GRANITE STATE INSURANCE COMPANY, Plaintiff, VS. TANDY CORPORATION and T. C. ELECTRONICS (KOREA) LTD., Defendants	§ § § § § § § § § § §	C. A. NO. _____ RULE 9(H) ADMIRALTY CLAIM

COMPLAINT FOR DECLARATORY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Plaintiff GRANITE STATE INSURANCE COMPANY (**"GSIC"**), and pursuant to 28 U.S.C. § 2201 *et seq.*, files this its Complaint for Declaratory Judgment against the Defendants, TANDY CORPORATION (**"TANDY"**) and T. C. ELECTRONICS (KOREA) LTD. (**"TCEK"**), respectfully showing the Court that:

I.

THE CASE

This is an action for a declaratory judgment pursuant to § 2201 *et seq.* of Title 28, United States Code, for the purpose of determining a question of actual controversy between the parties, as hereinafter more fully appears.

II.

THE PARTIES

Plaintiff GSIC is a New Hampshire corporation with its principal place of business in Manchester, New Hampshire. Defendant Tandy is a Delaware corporation with its principal place of business in Fort Worth, Texas. Defendant TCEK is a Korean corporation with its principal place of business in Masan, Korea. TCEK and Tandy are the alter egos of each other for all purposes material to this lawsuit. Service upon Tandy constitutes service upon TCEK. Defendants may be served with process by serving their registered agent, H. C. Winn, 1800 One Tandy Center, Fort Worth, Texas 76102.

III.

THE COURT'S JURISDICTION

A. Admiralty Jurisdiction

This is a claim within the admiralty and maritime jurisdiction of this Honorable Court, inasmuch as it involves questions and issues related to formation and interpretation of a contract of marine insurance.

B. Diversity Jurisdiction

Alternatively, this case is brought by GSIC, a citizen of New Hampshire against Tandy Corporation, a citizen of Delaware and Texas and TCEK, a citizen of Korea, and the amount in controversy exceeds the sum or value of $50,000, exclusive of interest and costs. Accordingly, this

Court has jurisdiction of this matter under 28 U.S.C. § 1332.

IV.

APPLICABLE LAW

Pursuant to a Policy of insurance, the law and customs of England apply to and govern the resolution of this case, to the exclusion of the law or laws of any other state or nation. Alternatively, the maritime law of the United States applies.

V.

STATEMENT OF FACTS

The Parties

1. During all relevant times, TCEK has been a wholly-owned subsidiary or affiliate of Tandy for whose interests Tandy has purchased insurance. Tandy is a Fortune 500 Company with revenues of over $4 billion and 38,000 employees. Among other things, Tandy manufactures consumer electronic products and sells them through its Radio Shack network. During all relevant times, Tandy has employed a full-time in-house Corporate Risk Manager who is responsible for purchasing insurance for the worldwide requirements of Tandy and its subsidiaries or affiliates. During all relevant times, Alexander & Alexander of Texas, Inc. (**"A&A"**) acted as Tandy's outside insurance agent.

2. GSIC is an insurance company authorized to do business in the State of Texas. A&A, as agent of Tandy,

negotiated a certain policy of marine open cargo insurance for Tandy (and TCEK) with GSIC's underwriting agents.

The Policy Negotiations

3. On or about April 26, 1989, A&A opened negotiations with GSIC's Houston, Texas underwriting agent, American International Marine Agency, Inc. (**"AIMA"**) to seek competitive bids or quotations for the replacement of an existing part of Tandy's insurance program. By letter dated April 26, 1989, A&A provided to AIMA what was represented to be a copy of an existing "marine open cargo policy" previously placed by A&A, as agent for Tandy, through Mutual Marine Office, Inc. (**"MMO"**), a New York managing general agent, with Utica Mutual Insurance Company (**"Utica"**), as the insurer. The Utica policy principally addressed risks of physical loss or damage to Tandy's electronic goods, parts and accessories during marine or air transportation.

4. In its letter of April 26, 1989, a copy of which is attached as *Exhibit A*, A&A stated, in pertinent part:

> "In addition to the Ocean Air coverage the (Utica) policy has been expanded (just done recently and endorsements, etc. not received yet). It is intended to cover inventory consisting of raw materials, parts and accessories provided by suppliers of all descriptions, work-in-process and finished goods while in the following countries; Korea, Taiwan, Hong Kong, Guang Dong (Republic of China) and Japan." . . . "perils insured are all-risk including flood and earth quake, inland/ocean/air from point of supply

> or where the insured has an insurable interest in goods, through assembly, warehousing and ocean/air to final port destination."

During negotiations, A&A requested AIMA to provide a quote for the replacement coverage and maintained that the Utica policy endorsement extending coverage was in place but had not yet been received.

5. AIMA was requested to "quote" or bid on a competitive premium and was advised, "the current policies are very competitively priced and there are no dissatisfactions on the part of either client."

6. Ultimately, AIMA's bid for premium on the insurance to replace that said to be provided by Utica was successful. By letter dated July 6, 1989, AIMA confirmed to A&A the agreement to "bind" coverage effective June 22, 1989. As of that date, the terms of the extended coverage A&A represented was available to Tandy under the terms of the Utica policy had not yet been provided to AIMA.

7. Ocean Marine Cargo Binder No. MA 89 subsequently was prepared by A&A and a copy was provided to AIMA by A&A's letter of August 9, 1989. Reference therein was made under "special extensions" to an extension of coverage to include inventory at the assured's facilities in various Asian countries. However, the wordings of the endorsement said to have been in force previously with Utica were still not yet provided by A&A.

8. Draft wordings for the extended coverage endorsement were provided by A&A and were incorporated, as provided, into the policy subsequently issued on

behalf of GSIC, as Endorsement No. 2. A true and correct copy of GSIC Marine Open Cargo Policy is attached hereto as *Exhibit B*.

9. Throughout the negotiations leading to the agreement to bind coverage and the issuance of the GSIC policy, no notice of any problems involving Tandy's subsidiary, TCEK, its plant, goods or raw materials, was given by A&A or Tandy to AIMA or GSIC.

10. By letter dated January 7, 1991, to AIMA, A&A finally provided copies of the Utica policy endorsement with wordings A&A had represented were agreed by Utica during A&A's negotiation with AIMA. The endorsement to the Utica policy is dated "8/10/90", over one year after the expiration of the Utica policy and the effective date of GSIC's Policy. The Utica endorsement is said to be "effective . . . January 18, 1989."

The Policy

11. GSIC's Policy No. AIU 24-60684 is a "Marine Open Cargo Policy" with two numbered endorsements (the **"Policy"**). The Policy uses many standard clauses essentially addressed to movement of property or cargo by any means of transportation from point of origin to point of destination, "warehouse to warehouse." The Policy insures such property against all risks of physical loss or damage from any external cause, subject to certain terms, conditions and exclusions. The Policy does *not* insure consequential economic loss or non-physical damages.

12. Endorsement No. 2 to the Policy was added upon the representation by A&A that the previous coverage provided by Utica insured the identical risk at the time AIMA was asked to compete for the same insurance and to bind such coverage on behalf of GSIC. The substantive language in Endorsement No. 2 was adopted by GSIC as proposed by A&A, acting as agent of Tandy.[1]

TCEK – Korean Developments

13. At all material times, TCEK was Tandy's Korean manufacturing arm or subsidiary. TCEK conducted its

---

[1] The endorsement provides:

1. This policy is extended to cover inventory consisting of raw materials, parts and accessories provided by suppliers of all descriptions, work-in-process and finished goods while in the following countries: Korea, Republic of China, Taiwan and Hong Kong (transit exposure only in Hong Kong since warehouse inventory covered elsewhere). Perils insured are all-risk; including flood, cyclones, typhoons and earthquakes, inland/ocean air from point of supply or where the insured has an insurable interest in goods, through assembly, warehousing and ocean/air to final port of destination.
   Quarterly reports of values to be made and premium paid on average quarterly values at $.015 per hundred per month subject to a maximum quarterly average value of $10 million for any location. In the event of loss covered by this endorsement, the valuation used for such loss will be as follows:

Raw Materials	Cost x 120%
Work-in-process	Cost x 120% x 125%
Finished Goods	Sales price F.O.B. x 120%

   All other terms and conditions remain unchanged.

manufacturing activities in a complex of several buildings located in a free trade zone, known as the Masan Free Economic Zone (**"MAFEZ"**) in Masan, Korea (**"the Plant"**). TCEK imported materials from abroad into Korea for assembly at the Plant. TCEK also purchased materials from Korean suppliers and contracted for subassembly of materials to Korean contractors outside of MAFEZ.

14. At some time prior to April 26, 1989, TCEK began experiencing sporadic and increasingly severe labor problems which led to disturbances, violence and an eventual strike and occupation of the Plant by union members and sympathizers who forced TCEK's management out of the Plant.

15. Prior to April 22, 1989 TCEK and/or Tandy decided that TCEK would cease operations as a result of union activities and rising costs.

16. As a consequence of the decision TCEK began to scale back its business activities in Korea, reducing the amount of goods it ordered and attempting to remove key items of machinery from the MAFEZ. Ultimately, on March 31, 1989, TANDY held a general meeting of its shareholders at which it was decided to cease TCEK's MAFEZ operation permanently. The decision to close the Plant was made public on April 4, 1989 when TCEK management placed an advertisement in the local Korean daily newspaper.

17. Throughout the period from union formation, through and eventually after the closing of the MAFEZ plant, there were sporadic and occasionally violent clashes between union employees and those employees

who were sympathetic to management. Both management and union sought the intervention of government officials in an attempt to resolve their differences.

An occupation strike begins at the Plant.

18. On April 6, 1989, two days after the public announcement of the Plant's closure, members of the union initiated a sit-down strike in the MAFEZ plant and demanded that TCEK resume operations. The sit-down strike continued until December 21, 1989. On average about 20-25 workers regularly occupied the plant during that time.

19. On April 11, 1989, TCEK's President was detained in his office in Seoul, Korea by twenty former employees. The President was not able to escape from his captors until April 16, 1989. On April 20, 1989 the Korean police removed the former employees of TCEK from the President's Seoul offices.

Tandy designates a liquidator for the Plant.

20. After deciding to close the Plant, Tandy designated the Samil Accounting Corporation of Korea as liquidators for the Plant. On May 22, 1989 the appointed liquidator appeared at the Plant and attempted to gain entry. The occupying workers refused him entry. He tried again the following day but was again refused entry. Having been unable to force his way into the Plant, the liquidator petitioned the local court to obtain an order evicting the strikers from the Plant. The petition stated that:

1. On December 31, 1988, union workers at TCEK had interfered with efforts to remove "inserting machinery" from the Plant.
2. Another twenty union workers had occupied Technical Machine Division's special building at the Plant.
3. Twenty to thirty union workers had again interfered in efforts to remove equipment on June 5, 1989.

The local Korean court granted the liquidator's petition and ordered the striking workers to leave the Plant. However, the workers failed to comply and the police took no action to evict them.

Police storm the Plant.

21. Finally, on December 21, 1989 at 10:00 a.m., a reported 250 police officers forced their way into the Plant and took 21 strikers to the police station for detention. Four of the arrested union members were ultimately tried, convicted and sentenced on February 22, 1990 for their part in illegally conducting a sit-in strike at the Plant.

Renewed violence at the Plant.

22. On or about December 27-29, 1989 union workers and demonstrators forcibly seized and occupied various sections of the Plant, destroyed a barricade and broke windows, office furniture and damaged some manufacturing equipment. Most of the activities on the part of the rioting workers on December 27 and 28, 1989 took place on the roof of the factory, where the intruders sang

songs and shouted slogans. Since all known locations of inventory, raw materials and work-in-process were in locked areas of the Plant, very little, if any, physical damage was caused to inventoried goods of the type sought to be covered by the Policy. According to reports, the only damages inflicted by the demonstrators were on windows, furniture and plant manufacturing machinery.

TCEK and Tandy evacuate the Plant.

23. TCEK and Tandy requested the Korean police to provide protection for the Plant from December 20, 1989 until January 6, 1990 so they could safely remove their property. It is believed, and therefore alleged, that TCEK and Tandy could have had protection as long as required to safely evacuate the Plant, at their own request. TCEK and Tandy requested only about two weeks of police protection because that was all the time required to remove that machinery, equipment, inventory, materials and work-in-process from the Plant which was economically useable elsewh e. Tandy shipped only the machinery and so much of the material which was of use to its factories in other parts of Asia. Tandy did not ship from Korea items which were obsolete, materials in discontinued lines or work-in-process which was not economically transferrable to other assembly facilities. It is believed work already in process was only compatible with the production lines of the MAFEZ Plant, and Tandy had no use for it at other facilities. Accordingly, work-in-process was voluntarily abandoned by Tandy. Substantially all inventoried goods and raw materials left behind had not been damaged by external cause and were voluntarily abandoned by Tandy.

The liquidator sells TCEK's inventory for scrap.

24. TCEK's liquidator arranged for a salvage buyer to attend at the Plant and submit an offer for all goods located in the premises formerly occupied by TCEK. On January 7, 1990, the salvage buyer purchased all items remaining on the premises, including stock, equipment, machinery, fixtures, furnishings and fittings as one lot. The approximate purchase price was $165,000. Most of the goods and equipment sold as salvage were removed from the Plant by February 16, 1990. Those items purchased by the salvage buyer were in good and undamaged condition at the time of the sale. The salvage buyer elected to crush the components and to sell them as scrap, regardless of their condition when purchased, in order to avoid payment of duty on materials imported into a free trade zone.

Tandy and/or TCEK and/or A&A concealed and/or failed to disclose to AIMA and GSIC material facts.

25. At all pertinent times during negotiations and prior to AIMA binding coverage on behalf of GSIC, Tandy, TCEK and/or its agents A&A were aware of, but concealed and/or failed to disclose to AIMA or GSIC, the following facts material to the underwriting decision:

a. Tandy and TCEK had been experiencing severe labor problems and episodes of violent activities at the Plant in Masan, Korea since 1987;

b. Tandy and TCEK actually closed the Plant in Masan, Korea on March 31, 1989, long before they sought coverage from GSIC;

c. The Plant had been forcefully occupied by strikers from April 6, 1989, depriving Tandy and TCEK of actual possession and control of their inventory, equipment and property;

d. After the strikers took over the Plant, Tandy's and/or TCEK's representatives, including the liquidator, were not able to enter the Plant, even after obtaining a court order, because the striking workers physically and actively resisted their efforts to gain entry;

e. The occupation of the Plant imperiled and resulted in some damage to plant equipment, goods, work-in-process, inventory, materials, etc. even before AIMA was invited to bid on behalf of GSIC for the replacement coverage for Tandy and TCEK; and

f. TCEK had been placed into liquidation and the Plant itself was being liquidated.

26. All of the above information, and perhaps more not yet discovered by GSIC, was material to the decision to insure Tandy and TCEK, yet none was disclosed to AIMA or GSIC during negotiations for insurance coverage. All of the above information should have been, but was not, disclosed by Tandy and its agents A&A to AIMA or GSIC before the Policy was bound. Such information, had it been disclosed, would have materially affected the decision of GSIC to enter into the contract of insurance with respect to Tandy's Korean interests.

27. The underwriting submission of A&A dated April 26, 1989 with respect to Tandy's and TCEK's warehouse assembly operations represented that *"there have*

been no losses at any of the warehouse/assembly operations" (emphasis added). Given the information above, that representation of Tandy's agents of prior loss history which formed a part of the inducement to GSIC to enter into the contract of insurance was wholly inaccurate, incomplete and misleading.

Additional Defenses of GSIC under the Policy.

28. With respect to the alleged losses suffered by Tandy and/or TCEK:

a. Some actual damage to Tandy's and/or TCEK's property already had occurred and the peril of Strikes, Riot and Civil Commotion already had matured before GSIC's coverage was bound so that the "risks" otherwise subject to insurance were a certainty and no longer fortuities subject to being insured;

b. Comparatively little of any "inventoried" property otherwise subject to insurance by GSIC actually suffered "physical loss or damage" from an otherwise insured peril.

c. Most property which did receive physical damage was part of the manufacturing equipment, assembly lines and building improvements which were not insured by GSIC.

d. Tandy and/or TCEK had ample time and ability to remove substantially all of their property from Korea after they regained control of the premises, yet knowingly selected for removal only such items which were economically usable elsewhere and

deliberately abandoned the remainder by selling such materials for "scrap". While the decision of Tandy and/or TCEK may have been sound economically, such an economic decision to abandon sound property does not qualify that abandoned property to be the subject of a claim under an insurance against "physical loss or damage to property from an external cause."

e. Those abandoned items of inventoried goods sold for salvage and "scrap" value suffered no insured physical damage, yet were deliberately destroyed because import duties made their resale for use within Korea economically unreasonable.

Notice of Loss.

29. A&A, as Tandy's agents, gave first notice of a potential claim to Al Marine Adjusters, Inc. (**"AIM Adjusters"**), as claims agents for GSIC, on January 12, 1990. In response, AIM Adjusters, on behalf of GSIC, issued a letter to Tandy in which it gave notice of appointment as adjuster and reserved all of GSIC's rights and defenses under the Policy and at law. A full, true and correct copy of the reservation of rights letter is attached hereto as *Exhibit C*. In that letter, AIM Adjusters raised several questions regarding the non-disclosure of material facts, the accuracy of A&A's underwriting submission that there have been no losses regarding TCEK's operations, the accuracy of A&A's representations regarding the nature and character of prior coverage with Utica, other insurance coverage available to Tandy and/or TCEK regarding their alleged losses, and other pertinent

issues under the Policy. Thereafter, on March 20, 1990, AI Marine Adjusters sent to A&A as Tandy's agents a letter requesting additional information and documents that would assist AIM Adjusters and GSIC in their evaluation of Tandy's claim under the Policy. A full, true and correct copy of the March 20, 1990 letter is attached hereto as *Exhibit D*. No informative or timely response was received to that letter from either Tandy or A&A conveying the additional information or documents requested.

30. Tandy sent to AIM Adjusters a letter dated November 28, 1990, received by AIM Adjusters on December 10, 1990, enclosing a sworn "Proof of Loss" form. In the "Proof of Loss," Tandy claims that the amount of damage to property covered under the Policy was $10,612,993.00 and makes a claim for the full Policy limits of $10 million. A true copy of Tandy's letter and the "Proof of Loss" is attached hereto as *Exhibit E*. A true copy of AIM Adjusters response of December 14, 1990 is attached as *Exhibit F*.

VI.

CAUSES OF ACTION

Suit for Declaratory Judgment

31. GSIC incorporates and re-alleges paragraphs 1 through 30 as if fully set forth below.

32. The Policy is a Marine Open Cargo policy which by its terms requires the application of English law or, alternatively is subject to the general maritime law of the United States.

33. Under any applicable law, Tandy and/or TCEK and/or A&A owed to GSIC a full and candid disclosure of all facts that might be material to the underwriting decision by GSIC.

34. In addition and/or alternatively, Tandy, TCEK and/or A&A, misrepresented and/or concealed facts material to the underwriting decision they requested of GSIC.

35. There exists justiciable controversy between the parties regarding the following issues:

1. Did A&A and/or Tandy accurately represent and fully disclose to AIMA and/or GSIC all material facts for the purpose of inducing GSIC to issue the Policy?
2. Does the failure of Tandy and/or TCEK and/or A&A to accurately represent and fully disclose to AIMA and GSIC all material facts render the Policy, or at least that much of the Policy as pertains to the TCEK losses, void *ab initio*?
3. Did allegedly covered losses of Tandy and/or TCEK occur before the Policy became effective?
4. What, if any, losses suffered by Tandy and/or TCEK were the result of fortuitous occurrences or perils insured under the Policy, if the Policy was in effect?
5. Do the alleged losses of Tandy and/or TCEK fall within the physical loss or damage concept of the Policy coverage, or were such losses in the nature of economic loss and/or the result of the deliberate abandonment of

property and/or the economic and technical obsolescence of their property?

6. Were the inventory, materials and work-in-process, for whose loss the claim is made, within Tandy's and/or TCEK's possession and control at the time the Policy allegedly became effective?

7. Was the sale of the inventory, materials and work-in-process for whose loss the claim is made, the result of a deliberate and voluntary business decision, and not a fortuitous event of a kind otherwise covered under the Policy?

8. Did the alleged losses of Tandy and/or TCEK occur on March 31, 1989, when Tandy and TCEK decided to shut down the Plant and to cease production operations in Korea, long before the effective date of the Policy?

9. If coverage attached and policy defenses raised herein are invalid, how much of the property insured by this policy suffered a loss of the type insured?

36. Accordingly, GSIC petitions the Court, pursuant to § 2201 *et seq*, Title 28, United States Code, to consider the relevant facts and circumstances surrounding the negotiations for and the issuance of the Policy, the long history of the violent labor strife at the Plant, the nature of the alleged losses resulting from those labor disturbances, and to construe the Policy, and any other relevant documents and information, and declare as follows:

1. Tandy and/or TCEK and/or A&A concealed, misrepresented and/or failed to disclose accurately and fully material facts for

the express purpose of inducing GSIC to issue the Policy;

2. Tandy and/or TCEK and/or A&A had and breached an obligation of utmost good faith during their negotiations and did not negotiate in good faith with AIMA and GSIC for the issuance of the Policy.

3. The failure of Tandy and/or TCEK and/or A&A to negotiate in good faith and/or to accurately represent and fully disclose material facts prior to the issuance of the Policy has rendered the Policy, or at least that much of the Policy as pertains to the alleged TCEK losses, void *ab initio*;

4. In the alternative, even if the Policy is valid and in force, the alleged losses of Tandy and/or TCEK do not fall within the Policy coverage because:

   a. such losses occurred before the Policy attached;

   b. such losses are in the nature of consequential economic loss due to Tandy's and/or TCEK's deliberate abandonment of their property in Korea, and economic and technical obsolescence of such property, rather than physical loss or damage;

   c. such losses were not the result of a fortuitous event but of a voluntary business decision of Tandy and/or TCEK to close the Plant.

5. The property sought to be insured was not (or was not substantially) damaged by an insured peril.

WHEREFORE, PREMISES CONSIDERED, GSIC respectfully requests a declaratory judgment against Tandy and TCEK as requested above and an award of attorneys' fees and costs as allowed by law. In addition, GSIC prays for such other and further relief and declarations to which GSIC may be justly entitled.

Respectfully submitted,

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EXHIBIT A

Alexander & Alexander of Texas, Inc.
Suite 100
6100 Western Place
P.O. Box 2950
Fort Worth, Texas 76113
Telephone 817 737-4000
TWX 910-893-5029

April 26, 1989

Mike Hilshire
american International Marine Agency
2200 N. Loop West
Suite 200
Houston, Texas 77018

RE: A&A International, Inc./InterTAN, Inc.
Ocean/Air Cargo Cover

Dear Mike:

Enclosed is the following information on the above referenced:

1. Policy copies for each entity.
2. Value of goods shipped and average monthly inventory figures for warehouse/assembly operations.
3. Ocean/Air loss information. There have been no losses at any of the warehouse/assembly operations.

A&A International is the import/export and transportation arm of Tandy Corp. (Radio Shack, etc.). InterTAN Inc. is a distinct and separate entity established in 1987 and is the foreign version of Tandy Corp. Therefore, two seperate [sic] policies will be needed. A&A International expires 7-1-89 and InterTAN expires 6-1-89.

The policy for InterTAN is reasonably "plain vanilla". The policy for A&A International is more complex. In addition to the Ocean/Air coverage the policy has been expanded (just done recently and endorsements, etc. not received yet). It is extended to cover inventory consisting of raw materials, parts and accessories provided by suppliers of all descriptions, work in process and finished goods while in the following countries; Korea, Taiwan, Hong Kong, Guang Dong (Republic of China) and Japan. Hong Kong is transit only since a separate policy covers the warehouse. Perils insured are all-risk including flood and earthquake, inland/ocean/air from point of supply or where the insured has an insurable interest in goods, through assembly, warehousing and ocean/air to final port destination. The limits of liability needed for land operations are $10,000,000 for all countries except Japan where $25,000,000 is needed for the consolidation warehouses. Earthquake is limited to $10,000,000 everywhere. The ocean/air limit is $7,500,000 for each entity. Please quote a $10,000,000 limit for ocean/air.

The current policies are very competitively priced and there are no dissatisfactions on the part of either client. On losses, we have a $10,000 draft authority. Since the first expiration is June 1, 1989, I will need your quotation no later than May 24, 1989. Please plan to quote both entities at the same time.

Should inspections be necessary or if you need further information, please contact me.

Thank you for your interest.

Sincerely,

/s/
Dick Heigele
Vice President
Property Marketing Manager

DH/jw
Enclosure

EXHIBIT B
MARINE OPEN CARGO POLICY

OF

GRANITE STATE INSURANCE COMPANY
MANCHESTER, NEW HAMPSHIRE

ISSUED TO

TANDY CORPORATION
1800 ONE TANDY CENTER
FORT WORTH, TEXAS 76102

NO. AIU 24-60684

NOTICE

1. PLEASE READ YOUR ENTIRE POLICY.

2. This Policy covers automatically on all shipments which come within its scope. It is important that all such shipments be reported as soon as known and the valuation thereof declared as soon as ascertained.

3. Your attention is called to the basis of Insured Value as set forth in the Valuation Clause on page 4. The Insured Value should always be in accordance with the basis specified therein unless otherwise agreed with the Company prior to shipment.

4. Any damage to the goods should be noted on the receipt given to the carrier if possible; and in any event as soon as it is known that the shipment has sustained loss or damage, written claim should be filed with the carrier. Such steps may be necessary to preserve your rights and the Company's rights of subrogation against the carrier. Filing claim against the carrier will not affect in any way your rights under this Policy.

5. In the event of any known or reported loss or damage the nearest Settling Agent, Claims Agent or Company

Representative should be notified promptly to protect the interests of all concerned. If no such party is available then prompt notice should be given to the nearest Correspondent to the American Institute of Marine Underwriters or to the nearest accredited representative of Lloyd's, London.

GRANITE STATE INSURANCE COMPANY (hereinafter referred to either as the Company or as the ASSURERS), in consideration of premiums to be paid at the rates set forth in the schedules attached hereto, or as may be agreed upon from to time, does make insurance and cause.

TANDY CORPORATION
(INCLUDING ANY SUBSIDIARY, CORPORATION OR CORPORATIONS AS THEIR INTEREST MAY APPEAR)

(hereinafter referred to as the ASSURED) to be insured, subject to terms, conditions, exceptions and warranties hereinafter set forth,

1. For Account of Whom it May Concern

LOSS PAYABLE CLAUSE

2. Loss, if any, to be paid in funds current in the United States to the ASSURED or order, or to bank or bankers as their interest may appear, subject to the provisions of Clauses 48, 49 and 50 hereinafter set forth.

GOODS INSURED

3. Upon all kinds of lawful goods and merchandise, consisting principally of **RADIOS, ELECTRONIC EQUIPMENT, COMPUTERS, COMPUTER COMPONENTS,**

THEIR PARTS, ACCESSORIES, SIMILAR TYPE MERCHANDISE, AND OTHER APPROVED MERCHANDISE INCIDENTAL TO THE BUSINESS OF THE ASSURED, OR HELD COVERED.

ATTACHMENT DATE

4. Shipped on and after **JUNE 22, 1989**

CONVEYANCES

5. (a) Per Iron and/or Steel Steamer or Steamers and/or Iron and/or Steel Vessel or Vessels propelled by power (excluding sailing vessels, with or without auxiliary power, except as connecting conveyances) and connecting conveyances;

   (b) By aircraft and connecting conveyances;

   (c) By mail, parcel post, airmail, air parcel post, air express, or air freight, subject, however, to the condition that all shipments by mail of any class must be registered or Government insured wherever possible.

GEOGRAPHICAL LIMITS

6. At and from ports and/or places **IN THE WORLD TO PORTS AND/OR PLACES IN THE WORLD EXCLUDING SHIPMENTS TO CUBA, CAMBODIA, LIBYA, NORTH KOREA, NIGERIA AND VIETNAM AND FURTHER EXCLUDING SHIPMENTS WHOLLY WITHIN THE 48 CONTIGUOUS STATES OF THE U.S. AND CANADA.**

direct or via other ports or places, with privilege of transshipment by land and/or water.

INTEREST INSURED

7. Shipments under deck and/or on deck, (a) made by the ASSURED, being the property of the ASSURED or that of others in which the ASSURED may have an insurable interest or for which the ASSURED may hold or receive instructions to effect insurance provided such instructions be given in writing prior to shipment, and before any known or reported loss or accident; and/or (b) consigned to the ASSURED or to others for the account or control of the ASSURED, being the property of the ASSURED or that of others in which the ASSURED may have an insurable interest or for which the ASSURED may hold or receive instructions to effect insurance, provided such instructions be given in writing prior to shipment, and before any known or reported loss or accident; but excluding shipments sold by the ASSURED on F.O.B., F.A.S., Cost and Freight, or similar terms whereby the ASSURED is not obliged to furnish marine insurance and also excluding such shipments as are bought by the ASSURED on C.I.F. terms, or other terms which include marine insurance.

VALUATION

8. Valued at amount of invoice, including all charges included in the invoice and including prepaid or advance freight and/or freight payable "vessel lost or not lost", not

included in the charges included in the invoice, plus*. Foreign currency is to be converted into United States currency at Banker's sight rate of exchange applicable to each invoice and/or credit and/or draft.

***SEE INDORSEMENT [sic] NO.1**

IMPORT DUTY

9. This insurance does not cover duty unless there be a specific endorsement in respect thereof attached hereto.

LIMIT OF INSURANCE

10. This insurance shall not attach or cover and the ASSURERS shall not be liable for more than **$10,000,000.** by any one vessel or conveyance or in any one place at any one time or in any one disaster or accident, unless otherwise agreed upon; but in respect of shipments on deck it is understood and agreed that this insurance will not attach or cover and these ASSURERS shall not be liable for more than **$10,000,000.** whilst on board the vessel.

In respect of parcel post shipments, these ASSURERS shall not be liable for more than **$2,000.00** for any one package by unregistered parcel post nor more than **$2,000.00** for any one package by registered mail, registered parcel post or Government insured parcel post; nor for more than **$500,000.** for any one package by air conveyances; nor for more than **$10,000,000.** by any one Aircraft.

ACCUMULATION

11. Should there be an accumulation of shipments in respect of which the insured value exceeds the limits expressed in this Policy by reason of interruption of transit and/or other occurrences beyond the control of the ASSURED or by reason of any casualty and/or at a transhipping point and/or connecting steamer or conveyance, the ASSURERS shall hold covered such excess amount and shall be liable for the full amount at risk, provided written notice be given to the ASSURERS in all such cases as soon as the fact becomes known to the ASSURED; but in no event shall the ASSURERS be liable hereunder for more than double the limits hereinbefore specifically provided.

PERILS: WATERBORNE

12. Touching the adventures and perils which the ASSURERS are contented to bear and take upon themselves while the goods and/or merchandise are waterborne (notwithstanding any extension of coverage provided under this Policy, unless otherwise specifically agreed), they are of the Seas, Fires, Assailing Thieves, Jettisons, Barratry of the Master and Mariners, and all other like perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the said goods or any part thereof, except as may be otherwise specifically provided for herein or endorsed hereon.

Note: For perils insured against while the goods are on docks, wharves or elsewhere on shore and/or during land transportation within the coverage of this Policy, see Clause 35.

AVERAGE TERMS & CONDITIONS

13. (a) Except while on deck of ocean vessel **AND SUBJECT TO AN ON DECK BILL OF LADING, SHIPMENTS CONSISTING OF APPROVED GENERAL MERCHANDISE – RADIOS, ELECTRONIC EQUIPMENT, COMPUTERS, COMPUTER COMPONENTS, THEIR PARTS AND ACCESSORIES AND OTHER APPROVED MERCHANDISE INCIDENTAL TO THE BUSINESS OF THE ASSURED IN APPROVED OVERSEAS PACKING ARE INSURED:**

AGAINST ALL RISKS OF PHYSICAL LOSS OR DAMAGE FROM AN EXTERNAL CAUSE IRRESPECTIVE OF PERCENTAGE, EXCEPTING THOSE EXCLUDED BY THE F.C. & S. AND S.R. & C.C. WARRANTIES.

IT IS AGREED THAT ALL MERCHANDISE SHIPPED ON BOARD THE OCEAN VESSEL IN INTERMODAL, OVER-THE-ROAD OR SIMILAR CARGO CONTAINERS ARE INSURED ALL RISKS, EVEN THOUGH SUCH CONTAINERS BE STOWED ON DECK OR THE MERCHANDISE IS SHIPPED UNDER AN OPTIONAL BILL OF LADING WHICH PERMITS THE CARRIER TO LOAD IT ON OR UNDER DECK.

HOWEVER, IT IS UNDERSTOOD AND AGREED THAT EACH CLAIM FOR LOSS OR DAMAGE SHALL BE ADJUSTED SEPARATELY, AND FROM THE AMOUNT OF EACH ADJUSTED CLAIM THE SUM OF $5,000. SHALL FIRST BE DEDUCTED.

(b) **ON DECK:** Warranted **FREE OF PARTICULAR AVERAGE** unless caused by the stranding, sinking, burning and/or collision of the vessel; but to pay the insured value of any merchandise and/or goods jettisoned and/or washed overboard, irrespective of percentage. This coverage is subject to the condition that the declaration or certificate of insurance shows the shipment to have been made on deck.

Notwithstanding the foregoing, merchandise and/or goods shipped on deck under an underdeck bill of lading, without the knowledge and consent of the shipper, shall be treated as Underdeck Cargo and insured as per subdivision (a) above.

BY AIRCRAFT

14. Shipments by aircraft are covered against **ALL RISKS** of loss of and/or damage to all or any part of the merchandise and/or goods from any external cause, irrespective of percentage, but warranted free of claim for loss of damage due to difficulty or changes in atmospheric pressure, and in all events excluding the risks excepted by the Free of Capture and Seizure and the S.R. &

C. C. Clauses incorporated herein. Whenever the words "ship," "vessel," "seaworthiness," "shipowner" or "vessel owner" appear in this Policy, they are deemed to include also the words "aircraft," "airworthiness," "aircraft owner."

***THE RISK BY MESSENGERS AND/OR CONVEYANCES TO AND FROM AIRPORT ARE INCLUDED.**

SHIPMENTS BY AIRCRAFT ARE NOT SUBJECT TO A DEDUCTIBLE

BY MAIL

15. While the parcels are in due course of transit in the custody of postal authorities to the post office address shown thereon, the same are insured against **ALL RISKS** of loss of and/or damage to all or any part of the merchandise and/or goods from any external cause, irrespective of percentage, excluding, however, the risks excepted by the Free of Capture and Seizure and the S.R. & C.C. Clauses incorporated herein.

It is understood and agreed that a certificate of mailing will be secured from the Postal Authorities for each package shipped by ordinary mail or parcel post, if possible. Shipments are to be made in accordance with United States Post Office Department rules or regulations, or in accordance with the rules and regulations of the postal authorities of the country where mailed if such mailing occurs outside the United States. When permitted, mail shipments are to be sent by Government insured parcel post or, if this is not

possible, by registered parcel post, if permissable. The ASSURED agrees that each package shipped by Government insured parcel post, valued at $100 or less, will be insured with the Government for at least 50% of the actual value and that each package, valued in excess of $100, will be insured with the Government for not less than $50, or for the maximum amount of insurance allowed by the Government, if the maximums be lower.

***THE RISK BY MESSENGERS AND/OR CONVEYANCES TO AND FROM POSTAL AUTHORITIES IS INCLUDED – $2,000. LIMIT**

SUE & LABOR CLAUSE

16. In case of any loss or misfortune, it shall be lawful and necessary to and for the ASSURED, his or their factors, servants and assigns, to sue, labor and travel for, in and about the defense, safeguard and recovery of the goods and merchandise insured hereunder, or any part thereof, without prejudice to this insurance, to the charges whereof this Company will contribute according to the rate and quantity of the sum hereby insured; nor shall the acts of the ASSURED or of this Company in recovering, saving and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment.

DAMAGE BY DAMPNESS, DECAY, MOULD, ETC.

17. Warranted in respect of shipments by water free from damage or injury from dampness,

change of flavor, decay, or from being spotted, discolored, musty, mouldy, soured, rusted, or any other form of deterioration, unless caused by actual contact of seawater with the articles damaged, occasioned by sea perils.

[The following paragraphs 18, 19 and 20 were stamped "VOID."]

BREAKAGE, LEAKAGE, ETC.

18. Warranted free of any claims for losses arising from breakage and/or leakage and/or loss in weight and/or loss of contents unless caused by stranding or collision with another vessel. The liability of the ASSURERS for such losses shall also be subject to, but shall not be deemed enlarged or extended by, any provision of this Policy or any amendment thereof defining liability (or excluding liability of the ASSURERS for particular average losses).

LOADING OF GRAIN, PETROLEUM & HEAVY CARGOES

19. Warranted by the ASSURED that vessels to be loaded with Grain, Petroleum and/or heavy cargoes shall be loaded under the inspection of a surveyor appointed or approved by the Company for that purpose and his certificate as to proper loading and seaworthiness must be obtained before the sailing of such vessels or the insurance under this Policy in respect of such cargo to be void.

GROUNDING CLAUSE

20. Grounding in canals, harbors, or tidal rivers not to be deemed a stranding within

the meaning of this Policy or any amendment thereof; but the ASSURERS to pay for any loss or damage to the goods or merchandise which may be proved to have resulted directly therefrom and which would be recoverable under the terms of this Policy if caused by stranding.

GENERAL AVERAGE CONTRIBUTORY CLAUSE

21. The Company shall be liable for only such proportion of General Average and Salvage Charges as the sum hereby insured (less Particular Average for which this Company is liable hereunder, if any) bears to the contributory value of the goods or merchandise insured hereunder.

NORMAL LOSS

22. In the event of claim under this insurance for loss of and/or damage to merchandise and/or goods upon which there is a normal or usual loss, it is hereby mutually agreed that the claim shall be adjusted and the insured value of the part or parts lost or damaged shall be arrived at in the adjustment of the claim on the basis of expected outturn, whether or not the deduction of normal loss be provided in this insurance or be a trade custom.

PARTIAL LOSS

23. In all cases of partial loss or damage caused by perils insured against, the loss shall be determined by a separation of the damaged portion of the insured property from the sound portion and by an agreed estimate (by survey) of the percentage of damage of such damaged portion; or, if

such agreement is not practicable, then such damaged portion shall be sold either at public auction or by private sale (whichever the Company shall deem most advisable) for the account of the owner of the property and the amount of the loss shall be determined by comparison of the gross amount so realized with the sound market value of the portion so sold.

ILLICIT TRADE

24. Warranted free from any charge, expense, damage or loss which may arise in consequence of a seizure or detention for or on account of any illicit or prohibited trade or any trade in articles contraband of war or in the violation of any port rule or regulation.

WAREHOUSE TO WAREHOUSE CLAUSE

25. This insurance attaches from the time the goods leave the Warehouse and/or Store at the place named in the Declaration and/or Certificate for the commencement of the transit and continues during the ordinary course of transit, including customary transhipment if any, until the goods are discharged overside from the overseas vessel at the final port. Thereafter the insurance continues whilst the goods are in transit and/or awaiting transit until delivered to final warehouse at the destination named in the Policy or until the expiry of 15 days (or 30 days, if the destination to which the goods are insured is outside the limits of the port) whichever shall first occur. The time limits referred to above to be reckoned from midnight of the day on

which the discharge overside of the goods hereby insured from the overseas vessel is completed. Held covered at a premium to be arranged in the event of transhipment, if any, other than as above and/or in the event of delay in excess of the above time limits arising from circumstances beyond the control of the ASSURED.

It is necessary for the ASSURED to give prompt notice to these ASSURERS when they become aware of an event for which they are "held covered" under this Policy and the right to such cover is dependent on compliance with this obligation.

MARINE EXTENSION CLAUSES

26. I. This insurance attaches from the time the goods leave the warehouse at the place named in the Policy, certificate or declaration for the commencement of the transit and continues until the goods are delivered to the final warehouse at the destination named in the Policy, certificate or declaration, or a substituted destination as provided in Clause III hereunder.

II. This insurance specially to cover the goods during

(i) deviation, delay, forced discharge, re-shipment and transhipment.

(ii) any other variation of the adventure arising from the exercise of a liberty granted to the shipowner or charterer under the contract of affreightment.

III. In the event of the exercise of any liberty granted to the shipowner or charterer under the contract of affreightment whereby such contract is terminated at a port or place other than the original insured destination, the insurance continues until the goods are sold and delivered at such port or place; or, if the goods be not sold but are forwarded to the original insured destination or to any other destination this insurance continues until the goods have arrived at final warehouse as provided in Clause I.

IV. If while this insurance is still in force and before the expiry of 15 days from midnight of the day on which the discharge overside of the goods hereby insured from the overease vessel at the final port of discharge is completed, the goods are re-sold (not being a sale within the terms of Clause III) and are to be forwarded to a destination other than that covered by this insurance, the goods are covered hereunder while deposited at such port of discharge until again in transit or until the expiry of the aforementioned 15 days while this insurance is still in force the protection afforded hereunder shall cease as from the time of the sale.

V. Held covered at a premium to be arranged in case of change of voyage or of any omission or error in the

description of the interest, vessel or voyage.

VI. This insurance shall in no case be deemed to extend to cover loss, damage or expense proximately caused by delay or inherent vice or nature of the subject matter insured.

VII. It is a condition of this insurance that there shall be no interruption or suspension of transit unless due to circumstances beyond the control of the ASSURED.

None of the foregoing subdivisions of this Clause 26 shall be construed as in any way enlarging any of the other terms and conditions of this Policy (except in so far as any of the provisions of Clause 25 of this Policy are inconsistent herewith), it being particularly understood and agreed that the F.C. & S. warranty remains in full force and effect and that nothing in the foregoing shall be construed as extending this insurance to cover any risks of war or consequences of hostilities.

CRAFT, ETC., CLAUSE

27. Including risks while in due course of transit on craft to and from the vessel; also to cover during any special or supplementary lighterage provided written notice be given the ASSURERS in all such cases when such facts are known to the ASSURED and additional premium to be paid if and as required; each craft to be considered as a

separate insurance within the meaning of Particular Average warranties. This insurance shall not be prejudiced by any agreement exempting lightermen from liability.

DEVIATION CLAUSE

28. This insurance shall not be vitiated by any unintentional error in description of vessel, voyage or interest, or by deviation, overcarrage, change of voyage, transhipment or any other interruption of the ordinary course of transit, from causes beyond the control of the ASSURED. It is agreed, however, that any such error, deviation or other occurrence mentioned above shall be reported to this Company as soon as known to the ASSURED, and additional premium paid if required.

F.P.A. CLAUSE

29. Warranted free from Particular Average unless the vessel or craft be stranded, sunk, or burnt, but notwithstanding this warranty these ASSURERS are to pay any loss of or damage to the interest insured which may reasonably be attributed to fire, collision or contact of the vessel and/or craft and/or conveyance with any external substance (ice included) other than water, or to discharge of cargo at port of distress. The foregoing warranty, however, shall not apply where broader terms of Average are provided for hereon or in the certificate or policy to which these clauses are attached.

WAREHOUSING & FORWARDING CHARGES, PACKAGES TOTALLY LOST LOADING, ETC.

30. Notwithstanding any average warranty contained herein, these ASSURERS agree to pay any landing, warehousing, forwarding and special charges for which this Policy in the absence of such warranty would be liable. Also to pay the insured value of any package or packages which may be totally lost in loading, transhipment or discharge.

LABELS CLAUSE

31. In case of damage affecting labels, capsules or wrappers, these ASSURERS, if liable therefore under the terms of this Policy, shall not be liable for more than an amount sufficient to pay the cost of new labels, capsules or wrappers, and the cost of reconditioning the goods, but in no event shall these ASSURERS be liable for more than the insured value of the damage merchandise.

MACHINERY CLAUSE

32. When the property insured under this policy includes a machine, article, interest or set consisting when complete for sale or use of several parts, then in case of loss or damage covered by this insurance to any part of such machine, article, interest or set, these ASSURERS shall be liable only for the proportion of the insured value of the part lost or damaged, or at the ASSURED's option, for the cost and expense, including labor and forwarding charges, of replacing or repairing the lost or damage part; but in no event shall these

ASSURERS be liable for more than the insured value of the complete machine, article, interest or set.

G/A CLAUSE

33. General Average and Salvage Charges payable according to United States laws and usage and/or as per Foreign Statement and/or as per York-Antwerp Rules (as prescribed in whole or in part) if in accordance with the Contract of Affreightment.

EXPLOSION CLAUSE

34. Including the risk of explosion, howsoever or wheresoever occurring during the currency of this insurance unless excluded by the F.C. & S. Warranty or the S. R. & C. C. Warranty set forth herein [illegible].

SHORE CLAUSE

35. Where this insurance by its terms covers while on docks, wharves or elsewhere on shore, and/or during land transportation, it shall include the risks of collision, derailment, overturning or other accident to the conveyance, fire, lightning, sprinkler leakage, cyclones, hurricanes, earthquakes, floods (meaning the rising of navigable waters), and/or collapse or subsidence of docks or wharves, even though the insurance be otherwise F.P.A.

BILL OF LADING, ETC., CLAUSE

36. The ASSURED is not to be prejudiced by the presence of the negligence clause and/or latent defect clause in the Bill of Lading

and/or Charter Party. The seaworthiness of the vessel as between the ASSURED and these ASSURERS is hereby admitted and the wrongful act or misconduct of the shipowner or his servants causing a loss is not to defeat the recovery by an innocent ASSURED if the loss in the absence of such wrongful act or misconduct would have been a loss recoverable on the Policy. With leave to sail with or without pilots, and to tow and assist vessels or craft in all situations, and to be towed.

INCHMAREE CLAUSE

37. This insurance is also specially to cover any loss or damage to the interest insured hereunder, through the bursting of boilers, breakage of shafts or through any latent defect in the machinery, hull or appurtenances, or from faults or errors in the navigation and/or management of the vessel by the master, mariners, mates, engineers or pilots.

DELAY CLAUSE

38. Warranted free of claim for loss of market or for loss, damage or deterioration arising from delay, whether caused by a peril insured against or otherwise, unless expressly assumed in writing hereon.

BOTH TO BLAME

39. Where goods are shipped under a Bill of Lading containing the so-called "Both to Blame Collision" Clause, these ASSURERS agree as to all losses covered by this insurance, to indemnify the ASSURED for this Policy's proportion of any amount (not exceeding the amount insured) which the

ASSURED may be legally bound to pay to the shipowners under such clause. In the event that such liability is asserted the ASSURED agrees to notify these ASSURERS who shall have the right at their own cost and expense to defend the ASSURED against such claim.

CONSTRUCTIVE TOTAL LOSS CLAUSE

40. No recovery for a Constructive Total Loss shall be had hereunder unless the property insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it cannot be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.

CARRIER CLAUSE

41. Warranted that this insurance shall not inure, directly or indirectly, to the benefit of any carrier or bailee.

42. The following Warranties set forth in Clause 43 shall be paramount and shall not be modified or superseded by any other provision included herein or stamped or endorsed hereon unless such other provisions refers to risks excluded by such Warranties and expressly assumes the said risks.

F.C. & S WARRANTY

43. (A) Notwithstanding anything herein contained to the contrary, this insurance is warranted free from capture, seizure, arrest, restraint, detainment, confiscation, preemption, requisition

or nationalization, and the consequences thereof or any attempt thereat, whether in time of peace or war and whether lawful or otherwise; also warranted free, whether in time of peace or war, from all loss, damage or expense caused by any weapon of war employing atomic or nuclear fission and/or fusion or other reaction or radioactive force or matter or by any mine or torpedo, also warranted free from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), but this warranty shall not exclude collision or contact with aircraft, rockets or similar missiles or with any fixed or floating object (other than a mine or torpedo), stranding, heavy weather, fire or explosion unless caused directly (and independently of the nature of the voyage or service which the vessel concerned or, in the case of a collision, any other vessel involved therein, is performing) by a hostile act by or against a belligerent power; and for the purposes of this warranty 'power' includes any authority maintaining naval, military or air forces in association with a power.

Further warranted free from the consequences of civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or from the consequences of the imposition of martial law, military or usurped power, or piracy.

S.R. & C.C. WARRANTY

Notwithstanding anything herein contained to the contrary, this insurance is warranted free from loss, damage or expense caused by or resulting from:

(1) strikes, lockouts, labor disturbances, riots, civil commotions, or the acts of any person or persons taking part in any such occurrences or disorders,

(2) vandalism, sabotage or malicious act, which shall be deemed also to encompass the act or acts of one or more persons whether or not agents of a sovereign power, carried out for political, terroristic or ideological purposes and whether any loss, damage or expense resulting therefrom is accidental or intentional.

CLAUSE PARAMOUNT

In the event that this Policy is extended to cover property prior to the attachment or subsequent to the expiration of the cover provided by the attached Marine Extension Clauses, such extension shall always be subject to the following exclusion unless specifically otherwise stated in writing signed by this Company in the extension endorsement or otherwise:

This Company shall not be liable for any claim for loss, damage or expense arising directly or indirectly from any nuclear incident, reaction, radiation or any radioactive contamination, all whether controlled or uncontrolled, occurring while said property is within the United States or any territory of the United States, the Canal Zone or Puerto Rico, or arising from a source therein, and whether the loss, damage or

expense be proximately or remotely caused thereby, or be in whole or in part caused by, contributed to, or aggravated by the peril(s) insured against in this Policy; however, subject to the foregoing and all provisions of this Policy, if this Policy insures against the peril of fire, then direct loss by fire resulting from nuclear incident, nuclear reaction, or nuclear radiation or radioactive contamination is insured against by this Policy.

OTHER TERMS AND CONDITIONS

SUBROGATION

44. It is hereby agreed by the ASSURED that upon payment of any loss or damage the Company is to be subrogated to all of the ASSURED'S rights of recovery on account of any and all such loss or damage from the carriers and from any other vessels, persons or corporations that may be liable therefor, including municipal corporations and government.

IMPAIRMENT OF SUBROGATION

45. This insurance warranted to be in all cases null and void to the extent of the liability of any carrier or other bailee and is understood and agreed that in case any agreement be made or accepted by the ASSURED with any carrier or bailee by which it is stipulated that such or any carrier or bailee shall have, in case of any loss for which the carrier or bailee may be liable, the benefit of this insurance or exemption in any manner from responsibility grounded on the fact of this insurance, then

and in that event this Company shall be discharged of any liability for such loss hereunder; also warranted to be null and void to the extent of any insurance by any carrier or bailee which would attach and cover the property if this Policy had not been issued and to be null and void as concerns loss or damage on land to the extent of any insurance directly or indirectly covering upon the property, whether prior or subsequent hereto in date. Provided, however, that in the event of loss, damage or expense to the property insured, which in the absence of the above warranties would have been recoverable under this insurance, should the carrier, bailee or other insurer fail to reimburse the ASSURED promptly, this Company agrees that, pending the collection of such loss from the carrier, bailee or other insurers it will provide the ASSURED with funds in an amount equivalent to that which would have been recoverable hereunder in the absence of such warranties, and the advancing for this purpose only of funds to the ASSURED for his protection pending such collection shall in no case be considered as affecting the question of the final liability of this insurance and, as soon as collection is made from the carrier and/or bailee and/or insurers, the title of the ASSURED to hold the sums so advanced by this Company shall discontinue and a portion thereof equal to the sum collected from the carrier and/or bailees and/or insurers, shall be repaid to this Company and the

portion of the sums advanced by this Company, equal to the sum short collected from the carriers and/or bailees and/or insurers, may be retained and applied in settlement of the actual liability of this Company thereby established (provided always the loss shall constitute in other respects a claim under this insurance). In the event of loss or damage this insurance shall be null and void to the extent of any payment made by any carrier or bailees or insurers whether liable or not.

ASSIGNMENT VOID

46. Warranted by the ASSURED that the assignment of this Policy or any insurable interest therein or the subrogation of any right thereunder to any party without the consent of the Company shall render the insurance affected by such assignment or subrogation void.

OTHER INSURANCE

47. It is hereby further agreed that if the said ASSURED shall have made any other insurance upon the property aforesaid, prior in day of date to this Policy, then this Company shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the property hereby insured and this Company shall return the premium upon so much of the sum by it insured as is shall be exonerated from by such prior insurance.

In case of any insurance upon the said property subsequent in the date to this Policy, this Company shall nevertheless be answerable for the full extent of the sum by it subscribed hereto, without right to or claim contribution from such subsequent insurers, and shall accordingly be entitled to retain the premium by it received in the same manner as if no such subsequent insurance had been made.

Other insurance upon the property aforesaid, of date the same as this Policy, shall be deemed simultaneous herewith and this Company shall not be liable for more than a ratable contribution in the proportion the sum by it insured bears to the aggregate of such simultaneous insurance and will return to the ASSURED an amount of premium proportionate to such reduction in liability.

PROOFS OF LOSS

48. Proofs of loss and all bills of expenses must be approved by the Agent of this Company, if there be one at or near the place where the loss occurs or the expenses are incurred or, if there be none in the vicinity, by the Correspondent of the Board of Underwriters of New York; and such agent or correspondent must be represented on all surveys.

NOTICE OF LOSS

49. Warranted by the ASSURED that all claims for loss of or damage to the goods insured hereunder shall be promptly reported to the Company or to the

PAYMENT OF LOSS

50. In cases of loss or other claim such loss or claim to be paid within thirty (30) days after submission to the Company or to the

AMERICAN INTERNATIONAL UNDERWRITERS CORPORATION
AND/OR ALEXANDER & ALEXANDER
OF TEXAS, INC.

of proper proof of loss and proper proof of interest in the goods or merchandise so involved (the amount of premium, if unpaid, and all other indebtedness due the Company by the ASSURED being first deducted).

TIME FOR SUIT

51. It is a condition precedent to any action, suit or proceeding for the recovery of any claim upon, under or by virtue of this Policy that such action, suit or proceeding shall be commenced within twelve (12) months next after the date of the accident, disaster or event causing loss of, or damage to, the insured goods or giving rise to a claim for sue and labor expenses or, in case of a claim for general average contribution, salvage and/or special charges, next after the date of actual payment thereof by the ASSURED: Provided, however, that if, by the laws of the State or other place within

which this Policy or any certificate thereunder is issued or where the action, suit or proceeding is instituted, such limitation is invalid, then any such claim shall become barred and void unless such action, suit or proceeding shall be commenced within the shortest limit of time permitted by the laws of such State or place to be fixed herein for the bringing of such suit, action or proceeding.

ATTACHMENT & CONTINUANCE

52. This Policy and the coverage granted thereunder to be deemed continuous and to attach and cover in respect of all merchandise and/or goods shipped on and after the attachment date named in Clause 4 hereof and is to continue in force thereafter until cancelled, as hereinafter provided in Clause 57, or otherwise voided by reason of breach of warranty, misrepresentation or concealment. Cancellation, however, shall not prejudice the insurance in effect in respect of shipments on which the risk hereunder attached prior to the termination of this Policy by cancellation.

DECLARATIONS

53. The ASSURED by the acceptance of this Policy warrants and agrees to report all shipments in respect of which insurance is provided hereunder to the **AMERICAN INTERNATIONAL UNDERWRITERS CORPORATION** or to

for transmission to the ASSURERS as soon as known to the ASSURED, or as soon thereafter as may be practicable. Should the ASSURED willfully fail to report shipments covered by this Policy, then the Policy as to all subsequent shipments shall at the Company's option become null and void. The Company or its agents shall be permitted to examine the books, accounts and records of the ASSURED for the purpose of tabulating and verifying all shipments in respect of which insurance is provided hereunder.

ERRORS AND OMISSIONS

54. It is, however, agreed that this insurance shall not be prejudiced by and unintentional delay or inadvertent omission in reporting hereunder or any unintentional error in the description of the interest, vessel or voyage, if prompt notice be given the ASSURERS in all such cases as soon as said delay and/or omission and/or error becomes known to the ASSURED and adjustment of premium be made if and as required.

CERTIFICATE OF AUTHORITY

55. Authority is hereby granted the ASSURED to countersign and issue the form of Certificate of Insurance furnished by the ASSURERS for any or all shipments in respect of which insurance is provided hereunder and in consideration thereof the ASSURED warrants that no certificate will be issued with terms thereon varying from the conditions of this Policy and/or any

written instructions that are or may be given by the ASSURERS and/or their Agent from time to time.

The ASSURED further warrants and agrees to mail or deliver a full and complete copy of each certificate issued, on day of issuance of certificate or as soon thereafter as may be practicable, to **AMERICAN INTERNATIONAL UNDERWRITERS CORPORATION** or to

ALEXANDER & ALEXANDER OF TEXAS, INC.

for transmission to the ASSURERS.

PREMIUM PAYMENTS

56. Premiums at the rates specified in the schedule attached hereto or as otherwise agreed shall be paid in cash and due immediately upon attachment of the risk; and the Company shall be entitled to premium on all shipments covered by this Policy, whether reported or not.

CANCELLATION

57. (a) This Policy may be cancelled by either party on giving the other or its agent SIXTY (60) days' written notice, unless otherwise mutually agreed upon or otherwise provided herein.

(b) Notwithstanding anything herein to the contrary, the Company may effect immediate cancellation of this Policy by giving written notice thereof at any time when any premium has been due and unpaid for a period of thirty (30) days; but such cancellation shall not

affect risks which have attached prior to such notice of cancellation.

BROKER AS AGENT FOR ASSURED

58. It is a consideration of this Policy that

ALEXANDER & ALEXANDER OF TEXAS, INC. P.O.BOX 2950 FORT WORTH, TEXAS 76113

the ASSURED'S broker, who caused this insurance to be written, or any substituted broker, shall be deemed to be and continue to be the Agent of the ASSURED for all purposes in connection with this insurance, and especially for the purpose of receiving notice of cancellation or for accepting or rejecting any proposed modification or alteration in the terms of this Policy. Any such notice given to the said Agent of any such modification or alteration agreed to by the said agent shall have the same effect as if given to, or agreed to by, the ASSURED. This agency shall continue until written notice of revocation by the ASSURED shall have been received by the ASSURERS or by the **AMERICAN INTERNATIONAL UNDERWRITERS CORPORATION.**

GOVERNING LAW

59. All questions of liability arising under this Policy are to be governed by the law and customs of England, except in the United States and its possessions.

60. PROVISIONS REQUIRED BY LAW TO BE STATED IN THIS POLICY: - This Policy is in a stock corporation.

IN WITNESS WHEREOF, this Insurance Company has executed and attested these presents; but this Policy shall not be valid unless countersigned by the American International Marine Agency of New York, Inc., or by another duly authorized agent of the Company.

/s/ Illegible
Secretary

/s/ Illegible
President

Countersigned at Houston, Texas

this 20th day of September 1989 By /s/Michael Hilsher

AMERICAN INSTITUTE 87B-109B
Endorsement for Open Policies (Cargo)
Strikes, Riots & Civil Commotions
(April 3, 1980)

To be attached to and form a part of Policy No.**AIU 24-60684** of **GRANITE STATE INSURANCE COMPANY** Insuring **TANDY CORPORATION.**

S.R. & C.C. ENDORSEMENT (Form No. 9)

THIS INSURANCE ALSO COVERS:

(1) damage, theft, pilferage, breakage or destruction of the property insured directly caused by strikers, locked-out workmen, or persons taking part in labor disturbances or riots or civil commotions; and,

(2) destruction of, or damage to, the property insured directly caused by vandalism, sabotage or malicious act, which shall be deemed also to encompass the act or acts of one or more persons, whether or not agents of a sovereign power, carried out for political,

terroristic or ideological purposes and whether any loss, damage or expense resulting therefrom is accidental or intentional; PROVIDED that any claim to be recoverable under this sub-section (2) be not excluded by the FC&S warranty in the policy to which this endorsement is attached.

While the property insured is at risk under the terms and conditions of this Insurance within the United States of America, the Commonwealth of Puerto Rico, the Canal Zone, the Virgin Islands and Canada, this insurance is extended to cover damage, theft, pilferage, breakage or destruction of the property insured directly caused by acts committed by an agent of any government, party or faction engaged in war, hostilities or other warlike operations, provided such agent is acting secretly and not in connection with any operation of military or naval armed forces in the country where the described property is situated.

Nothing in this endorsement shall be construed to include or cover any loss, damage, deterioration or expense caused by or resulting from:

a. change in temperature or humidity.

b. the absence, shortage, or withholding of power, fuel, or labor of any description whatsoever during any strike, lockout, labor disturbance, riot or civil commotion.

c. delay or loss of market.

d. hostilities, warlike operations, civil war, revolution, rebellion or insurrection, or civil strife arising therefrom, except to the limited extent that the acts of certain agents acting secretly have been expressly covered above.

e. any weapon of war employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter.

The Assured agrees to report all shipments attaching under this cover and to pay premiums therefore at the rates established by the Assurer from time to time.

The endorsement may be cancelled by either party upon forty-eight hours written or telegraphic notice to the other party, but such cancellation shall not affect any risks which have already attached hereunder.

Effective with respect to shipments made on or after **JUNE 22, 1989**

ENDORSEMENT NO. 1

VALUATION CLAUSE

Goods and Merchandise insured hereunder are valued in accordance with Section(s).

A. Valued at amount of shipping invoice, including all charges in the invoice, plus prepaid and/or advanced and/or guaranteed freight not included in the invoice. Also including insurance premiums hereunder if not included in the invoice.

INCLUDING DUTY

B. Imports sold by the Assured prior to arrival of the overseas vessel at port of discharge and prior to any known or reported loss or accident, to be valued at the amount of the Assured's sales invoice including all charges included in the invoice, (but, less import duty and/or inland freight, if included, provided such import duty and/or inland freight are separately insured hereunder) plus (Illegible) and/or advanced and/or guaranteed freight not included in the invoice. Also including insurance premiums payable hereunder if not included in the invoice but not less than the valuation as per Section C.

EXCLUDING INLAND FREIGHT

C. Imports not sold by the Assured prior to arrival of the overseas vessel at port of discharge or at the time of known or reported loss or accident to be valued at amount of shipper's invoice including all charges included in the invoice plus prepaid and/or advanced and/or guaranteed freight not

included in the invoice, plus insurance premiums payable hereunder.

Option is given the Assured of insuring for a higher value than produced by the applicable sections. Said option to be exercised prior to arrival of overseas vessel at port of discharge by delivery of a provisional declaration to this Company showing the desired basis of valuation or by insurance and delivery to this Company of final declaration, certificate or special policy of insurance. It is agreed that the difference in value between the "value as per policy" and the "higher value declared" is insured "Warranted no known or reported loss or is insured "Warranted no known or reported loss or accident" as of the date of said delivery. Foreign currency to be converted into dollars at bankers sight rate of exchange applicable to each invoice and/or credit and/or draft.

DURATION OF COVERAGE CLAUSE

28. Subject to the Warehouse to Warehouse Clause, Marine

Extension Clauses and South American Endorsement, notwithstanding that declaration may be made showing voyage between ports it is agreed that:

I. Goods and merchandise purchased by the Assured on terms which provide for the passing of title and/or payment at port of export, are insured hereunder from the commencement of the transit at original point of shipment, provided it can be shown by the contract of sale or other documents that at the time of the inception of the risk the shipment had been made in fulfillment of the contract.

II. Irrespective of terms or time of sale, goods and merchandise in which the Assured retain a financial interest and/or for which they may be legally liable are insured hereunder until delivered to final warehouses at destinations in the United States and/or Canada.

III. All other goods and/or merchandise covered by this policy are insured to or from interior places in the United States and/or Canada, provided the Assured has an insurable interest during such interior voyage.

RETURNED SHIPMENTS CLAUSE

45. A. Shipments returned and/or shipments refused by consignees are held covered until disposed of by the Assured by return to point of shipments, or otherwise at an additional premium to be agreed, providing such risk be reported to this providing such risk be reported to this Company with all reasonable promptness.

B. It is further agreed that goods and merchandise taken out of ordinary transit upon instructions of surveyors appointed by or on behalf of this Company

for the purpose of establishment of loss or damage, shall be held covered, subject to the original terms and conditions applying to such shipment, without payment of additional premium or advise to this Company, during such interruption or suspension or transit until disposed of by the delivery to and acceptance by the original consignee or by sale to others or otherwise, provided that during such interruption of suspension the Assured complies with the surveyor's instructions.

DELIBERATE DAMAGE CLAUSE

This insurance is extended to cover, but only while the property insured is on board a waterborne conveyance, loss of or damage to said property directly caused by governmental authorities acting for the public welfare to prevent or mitigate a pollution hazard or threat thereof, provided that the accident or occurrence creating the situation which required such governmental action would have resulted in a recoverable claim

under the Policy (subject to all its terms, conditions and warranties) if the property insured would have sustained physical loss or damage as a direct result of such accident or occurrence.

RELEASED BILL OF LADING CLAUSE

Privilege is hereby given to ship goods and merchandise covered by this Policy . . . under released or limited liability Bills of Lading, Charters or Shipping Receipts without prejudice to this insurance; the Assured to pay additional premium, if required.

FUMIGATION CLAUSE

In the event of the vessel or other place being fumigated and direct loss or damage to Assured's merchandise results therefrom, this Company agrees to indemnify the Assured for such loss or damage, and the Assured agrees to subrogate to this Company any recourse that they may have for recovery of such loss or damage from others.

SECURITIES SHIPMENTS

It is understood and agreed that shipments of registered and non-negotiable stock via a reputable Overnight Delivery Service will be

covered All Risk including Mysterious Disappearance.

Limit – $5,000,000. any one shipment.

Shipments to be declared separate.

All other terms and conditions remain unchanged.

Date:_____ /s/ Michael Hilsher
American International
Underwriters Corporation

TANDY2
MH/lw
09/19/89

ENDORSEMENT NO. 2

1. This policy is entended to cover inventory consisting of raw materials, parts and accessories provided by suppliers of all descriptions, work-in-process and finished goods while in the following countries: Korea, Republic of China, Taiwan and Hong Kong (transit exposure only in Hong Kong since warehouse inventory covered elsewhere). Perils insured are all risk; including flood, cyclones, typhoons and earthquake, inland/ocean/air from point of supply or where the insured has an insurable interest in goods, through assembly, warehousing and ocean/air to final port destination.

   Quarterly reports of values to be made and premium paid on average quarterly values @$.015 per hundred per month subject to a maximum quarterly average value of $10 million for any location. In the event of

loss covered by this endorsement, the valuation used for such loss will be as follows:

Raw Materials	Cost x 120%
Work-in-process	Cost x 120% x 125%
Finished Goods	Sales Price FOB x 120%

2. Coverage will extend to the goods insured while being stored at consolidating warehouses up to a limit of $10,000,000 at each location.

   In consideration of a deposit premium of $150,000 which is payable as noted below, the assured hereby agrees to report the total value of goods shipped for each category shown on the schedule of rates for the period of June 22, 1989 to June 22, 1990.

   No adjustment in premium shall be made, however unless values reported generate a premium which is greater than 10% or less than 10% of the deposit premium.

   The deposit premium is payable as follows:

Date Due	Amount
June 22, 1989	$ 12,500
July 22, 1989	12,500
August 22, 1989	12,500
September 22, 1989	12,500
October 22, 1989	12,500
November 22, 1989	12,500
December 22, 1989	12,500
January 22, 1990	12,500
February 22, 1990	12,500
March 22, 1990	12,500
April 22, 1990	12,500
May 22, 1990	12,500
Total Deposit Premium	$150,000

The above deposit premium does not include the premium for the inventory coverage or the premium for the consolidating warehouses in Japan.

All other terms and conditions remain unchanged.

Date: _____ /s/ Michael Hilsher
American International
Underwriters Corporation

TANDY3
MH/lw
09/19/89

SOUTH AMERICAN ENDORSEMENT

It is hereby mutually understood and agreed that the following clause will apply to all shipments insured in U.S. currency and shipped to South America.

> "Notwithstanding anything contained elsewhere herein to the contrary, (particularly the Warehouse to Warehouse and Marine Extension Clauses) the insurance provided hereunder shall continue to cover for sixty (60) days (ninety (90) days on shipments via the Magdalena River) after completion of discharge of the overseas vessel at port of destination or until the goods are delivered to the final warehouse at destination, whichever may first occur, and shall then terminate.
>
> The time limit referred to above to be reckoned from midnight of the day on which the discharge of the overseas vessel is completed."

All other terms and conditions remain unchanged.

Attached to and made part of Policy No. 24-60684 of the

GRANITE STATE INSURANCE COMPANY INSURING TANDY CORPORATION

Date SEPTEMBER 20TH 1989 By /s/ Michael Hilsher

PROFIT SHARING ENDORSEMENT

It is hereby understood and agreed that the actual Gross Marine Premium for the period of June 22, 1989 to June 22, 1990 hereunder are subject to a Profit Sharing Agreement whereby a "Loss Fund" equal to 80% of the Actual Gross Marine Premium shall be established. From such Fund shall be subtracted all Net Loss Payments and Reserves as per this Company's records and an amount equal to 20% of the remainder shall be returned to the Assured.

Gross Marine Premium shall be defined as all premium developed, excluding War and S.R. & C.C. by this policy.

Any deficit for an individual accounting period is to be applied against the profit sharing fund for the following year and if any deficit should then remain it shall be applied to the next following year and shall then be dropped.

Gross Marine premiums shall be the premium entered on the Company's books, less return, for risks attaching hereunder.

Net incurred losses shall be those losses, including all allocated fees and expenses, entered on the Company's

books as either paid or reserved claims, less net proceeds from salvages and recoveries.

Such refund is to be calculated within 90 days after the end of each annual period above mentioned.

In the event of cancellation of the Open Policy of which this Endorsement is a part, no refund shall be made hereunder.

All other terms and conditions remain unchanged.

Date: _____ /s/ Michael Hilsher
American International
Underwriters Corporation

TANDY
MH/lw
09/19/89

DUTY/INLAND FREIGHT CLAUSE

It is understood and agreed that this insurance also covers, subject to Policy terms of average, the risk of partial loss by reason of perils insured against on the duties imposed on goods imported into the United States, Canada, United Kingdom, Belgium and Australia, and insured hereunder, it being understood and agreed, however, that when the risk upon the goods continues beyond the time of landing from the overseas vessel, the increased value, consequent upon the payment of such duties, shall attach as an additional insurance upon the goods from the time such duty is paid or becomes due, to the extent of the amounts thereof actually paid or payable.

Any limit of liability expressed in this Policy shall be applied separately to such increased value.

The Assured warrants that on all risks insured hereunder a separate amount shall be reported sufficient to cover the said duty, upon which the rate of premium shall be an agreed percentage of the merchandise rate.

The Assured will, in all cases, use reasonable efforts to obtain abatement or refund of duties paid or claimed in respect of goods lost, damaged or destroyed. It is further agreed that the Assured, shall, when the Assurer so elects, surrender the merchandise to the customers authorities and recover duties thereon as provided by law, in which event the claim under this Policy shall be only for a total loss of the merchandise so surrendered and expenses.

This insurance on duty and/or increased value shall terminate at the end of the import movement covered under this Policy (including the Warehouse to Warehouse and/or Marine Extension Clauses if incorporated therein), but nothing contained in these clauses shall alter or affect any coverage granted elsewhere in the Policy during the storage or transit subsequent thereto.

All other terms and conditions remain unchanged.

Date: _____ /s/ Michael Hilsher
American International
Underwriters Corporation

TANDY1
MH/lw
09/19/89

SCHEDULE OF RATES

To be attached to and form a part of Policy No. 24-60684 of the GRANITE STATE INSURANCE COMPANY Dated EFF: JUNE 22, 1989 TANDY CORPORATION

The following are the present rates of premium of this Company applying to Under Deck Shipments per owned approved regular line steamers or motor vessels operating in their regular trade. Also per other iron or steel steamers or motor vessels which are not over 20 years of age nor less than 1000 tons net register and which are classed A-1 American Record, or 100A-1 Lloyds Register or equivalent, but excluding vessels built for service on the Great Lakes and vessels built for military or naval service.

[Two lines deleted.]

The rates below are subject to change on thirty (30) days notice.

HOWEVER, NOT BEFORE JUNE 22, 1990

RATE PER $100 – INSURANCE
~~UNDER DECK~~

COLUMN A – VIA STEAMER AS ABOVE

COLUMN B – VIA CERTIFIED AIRLINES

FROM: PORTS AND/OR PLACES IN THE WORLD

TO: PORTS AND/OR PLACES IN THE WORLD

	STEAMER	AIR
	.015	.015

WAREHOUSES – MAXIMUM AVERAGE VALUE $10,000,000. FOR ANY ONE LOCATION

.015 PER MONTH

WAR AND SR & CC INCLUDED IN THE ABOVE RATES.

EXCEPT "ON APPLICATION" AREAS HELD COVERED AT RATES TO BE NAMED.

[Line numbers on this document deleted in printing.]

GRANITE STATE
INSURANCE COMPANY
MANCHESTER, NEW HAMPSHIRE

American Institute (AIMU)
WAR RISK ONLY OPEN POLICY (CARGO)
(FEBRUARY 5, 1981)

THIS POLICY OF INSURANCE WITNESSETH, that in consideration of premiums as agreed to be paid, the Assurer does make insurance and cause TANDY CORPORATION to be insured, lost or not lost, for account of whom it may concern, against War Risks only, in accordance with the terms and conditions hereinafter set forth.

To apply to shipments made on or after JUNE 22, 1989.

This Company shall not be liable hereunder for more than $10,000,000.00 by any one vessel.

In cases where the total value(s) at risk on any one vessel exceed(s) the limit of liability as set forth in this Policy, the Assured agrees, nevertheless, to report to the Assurer full value(s) at risk and to pay premium thereon at the agreed rates. The Assured further agrees that acceptance of such reports and premium by the Assurer shall not serve to revoke or to overrule the limit of

liability set forth in this Policy; however, subject to the limit of liability, the Assurer in accepting these reports does agree to pay partial losses covered by this Policy without reduction by reason of any coinsurance which otherwise may have existed in the absence of this special agreement.

Subject to the provisions of Clause 4 of this Policy, should there be an accumulation of interests exceeding the above limit of liability by reason of any interruption of transit beyond the control of the Assured or by reason of any casualty, and/or after the interests have been discharged from the incoming overseas Vessel at an intermediate port or place for on-carriage from that or any other port or place by another overseas Vessel, and/or on the on-carrying overseas Vessel, this Policy shall attach for the full amount at risk (but in no event for more than twice the Policy limit which would be applicable to any one Vessel) provided written notice be given to this Assurer as soon as known to the Assured.

This Policy shall cover only those shipments which are insured against marine risks under Policy No. 24-60684 of this Company, it being agreed that the description of such shipments, the valuations thereof, the voyage, the designation of the overseas Vessel (which shall be construed to include aircraft if included under the marine policy) . . . which the goods are to be carried and the ports and/or places of loading and discharge, as reported under the said Policy against marine risks, shall be deemed incorporated herein. Notwithstanding the foregoing, this policy shall not cover purely domestic shipments by air between points in the United States of America (excluding Alaska and Hawaii).

Any loss payable hereunder shall be payable in funds current in the United States, to the order of ASSURED thirty days after full proofs of loss and proofs of interest have been filed with the Assurer.

1. (a) This insurance is only against the risks of capture, seizure, destruction or damage by men-of-war, piracy, takings at sea, arrests, restraints, detainments and other warlike operations and acts of kings, princes and peoples in prosecution of hostilities or in the application of sanctions under international agreements, whether before or after declaration of war and whether by a belligerent or otherwise, including factions engaged in civil war, revolution, rebellion or insurrection, or civil strife arising therefrom; the imposition of martial law, military or usurped power, and including the risks of aerial bombardment, floating or stationary mines and stray or derelict torpedoes, and weapons of war employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter but excluding loss, damage or expense arising out of the hostile use of any such weapon; and warranted not to abandon (on any ground other than physical damage to ship or cargo) until after condemnation of the property insured.

(b) This insurance also covers, but only while the property insured is on board a waterborne conveyance, loss of or damage to said property directly caused by governmental authorities acting for the public welfare to prevent or mitigate a pollution hazard or threat thereof, provided that the accident or occurrence creating the situation which required such governmental action would have resulted in a recoverable claim under this

Policy (subject to all of its terms, conditions and warranties) if the property insured would have sustained physical loss or damage as a direct result of such accident or occurrence.

2. Warranted free from any claim based upon loss of, or frustration of, the insured voyage or adventure caused by arrests, restraints or detainments.

3. This insurance does not cover any loss, damage or expense caused by or resulting from any of the following causes:

(a) Commandeering, preemption, requisition or nationalization by the government (defacto or otherwise) of the country to or from which the goods are insured.

(b) Seizure or destruction under quarantine, environmental or customs regulations.

(c) Delay, deterioration and/or loss of market.

4. (a) The insurance against the risks enumerated in Clause 1, except the risks of floating or stationary mines and stray or derelict torpedoes, floating or submerged referred to in (b) below, shall not attach to the interest hereby insured or to any part thereof

(i) prior to being on board an overseas Vessel (For the purpose of this Clause 4 an overseas Vessel shall be deemed to mean a Vessel carrying the interest from one port or place to another where such voyage involves a sea passage by that Vessel).

(ii) after discharged overside from an overseas Vessel at the intended port or place of discharge.

or

after the expiry of 15 days from midnight of the day of arrival of the overseas Vessel at the intended port or place of discharge, whichever shall first occur.

(iii) after expiry of 15 days from midnight of the day of arrival of the overseas Vessel at an intermediate port or place to discharge the interest for on-carriage from that or any other port or place by another overseas Vessel, but shall reattach as the interest is loaded on the on-carrying overseas Vessel. During the said period of 15 days the insurance remains in force whether the interest is awaiting transit or in transit between the overseas Vessels.

(iv) For the purposes of this Clause 4 arrival at the intended port or place of discharge shall be deemed to mean that time when the overseas Vessel first berths, anchors, moors or is secured in an area subject to regulation by the authorities of such port or place.

(b) The insurance against the risks of floating or stationary mines and stray or derelict torpedoes, floating or submerged, attaches as the interest hereby insured is first loaded on a lighter, craft or vessel after leaving the warehouse at point of shipment in transit

for the destination declared hereunder, and ceases to attach as the interest is finally landed from the vessel, craft or lighter prior to delivery to warehouse at such destination.

(c) If the contract of affreightment is terminated at a port or place other than the destination named therein such port or place shall be deemed the intended port or place of discharge for the purpose of this Clause 4.

(d) Shipments by mail, if covered by this Policy, are insured continuously from the time of leaving the sender's premises until delivered to the place of address.

(e) Shipments by air (other than by air mail), if covered by this Policy are insured subject to the same terms and conditions as shipments by overseas Vessel.

(f) It is a condition of this insurance that the Assured shall act with reasonable dispatch in all circumstances within their control.

(g) If anything contained in this Policy shall be inconsistent with this Clause 4 it shall to the extent of such inconsistency be null and void.

5. This insurance shall not be vitiated by deviation, overcarriage, change of voyage, or by any error or unintentional omission in the description of interest, vessel or voyage, provided the same be communicated to the Assurer as soon as known to the Assured and an additional premium paid if required.

6. And in case of any loss or misfortune, it shall be lawful and necessary to and for the Assured, his or their

factors, servants and assigns, to sue, labor and travel for, in and about the defense, safeguard and recovery of the said goods, and merchandises, or any part thereof, without prejudice to this insurance; nor shall the acts of the Assured or Assurers, in recovering, saving and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment; and to the charges whereof, the said Assurers will contribute according to the rate of quantity of the sum hereby insured.

7. General Average and Salvage Charges payable according to United States laws and usage and/or as per Foreign Statement and/or as per York-Antwerp Rules (as prescribed in whole or in part) if in accordance with the Contract of Affreightment.

8. It is agreed that the reports of shipments made under the Policy against marine risks mentioned above shall be deemed to be reports under this Policy also, and the Assured agrees to pay premiums on all shipments insured under this Policy at the war risk rates of the Assurer as fixed from time to time.

9. No claim shall be payable hereunder which arises from collision, contact with any fixed or floating object (other than a mine or torpedo), stranding, heavy weather or fire unless caused directly (and independently of the nature of the voyage or service which the Vessel concerned or, in the case of a collision, any other Vessel involved therein, is performing) by a hostile act by or against a belligerent power; and for the purpose of this paragraph "power" includes any authority maintaining naval, military or air forces in association with a power.

10. No recovery for a Constructive Total Loss shall be had hereunder unless the property insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it cannot be preserved from actual total loss without an expenditure which would exceed its value if the expenditure had been incurred.

11. It is agreed that this Policy is a separate and wholly independent contract and is not subject to any terms or conditions of the Policy against marine risks above mentioned (whether physically attached thereto or not) except as such terms or conditions shall have been expressly incorporated herein by reference.

12. This insurance may be cancelled by either party upon forty-eight hours written or telegraphic notice to the other party, but such cancellation shall not affect any shipment on which this insurance has attached under the terms of Clause 4 hereof prior to the effective date of such notice. Shipments on which this insurance has not so attached but for which, prior to the effective date of such notice, bills of lading have been issued and (in the case of exports) Certificates or special policies have been issued and negotiated, shall be covered from the time of loading on the overseas Vessel, as provided in Clause 4, at the rates of the Assurer, provided that, prior to said effective date, such shipments were at the risk of the Assured and were covered under the said Policy against marine risks.

In the event of loss which may give rise to a claim under this Policy, prompt notice shall be given to this Company.

Countersigned at HOUSTON, TEXAS

This 20th day of SEPTEMBER, 1989

/s/ Illegible
Secretary

/s/ Robert B. Sanborn
President

/s/ Michael Hilsher
Authorized Representative

EXHIBIT C

Logo
AI Marine Adjusters, Inc.
American International Building
2200 North Loop West, Suite 200
Houston, Texas 77018
713/683-4500 Telex # 361865

February 2, 1990

Mr. Jim Ashworth
Tandy Corporation
P.O. Box 17180
Fort Worth, Texas 76102

Re:	Claim No.:	6-55848
	Insured:	Tandy Corporation, et al
	Policy No.:	AIU 24-60684
	Issued by:	Granite State Insurance Company
	Date of Loss:	Unknown
	Nature of Claim:	Vandalism
	Location:	Masan, Korea

Dear Mr. Ashworth:

Your agents, Alexander & Alexander of Texas, Inc., gave first notice of this potential claim to A. I. Marine Adjusters, Inc. as claims agents for Granite State Insurance Company (GSIC), on January 12, 1990. A review of the Policy and the information furnished to us thus far has raised a number of issues and questions which we feel must be investigated further and resolved before Granite State Insurance Company can accept or deny any responsibility under the captioned Policy. Since a meeting is scheduled to take place on Monday, February 5, 1990,

in Hong Kong with your representatives and ours, the purpose of this letter is to place you on notice that there are such issues and questions yet unresolved, and to inform you that GSIC shall proceed with our investigation subject to a full reservation of all rights and defenses at law and under the captioned Policy.

More specifically, GSIC reserves all rights and defenses it may have arising out of the following matters:

1. Nondisclosure of material facts:

The effective date of the captioned Policy was June 22, 1989. Preliminary inquiries following receipt of your agents' first notice of this loss on January 12, 1990 indicate that neither Tandy Corporation nor its agents disclosed during negotiations for the insurance what we now believe are the following facts:

(a) That Tandy Corporation had been experiencing labor problems at its plant in Masan, Korea since 1987;

(b) That Tandy Corporation had closed its plant in Masan, Korea in approximately March of 1989 because of those labor problems;

(c) That when the plant was shut down, it was "taken over" by strikers;

(d) That after the strikers took over the plant, your representatives were not able to get into the plant, even after obtaining a Court Order;

(e) That effectively, you were deprived of management, control, supervision or a means of safeguarding the plant and its contents after the plant was closed and "taken over" by strikers, whose interests were adverse to

your own, all of which occurred during the period of negotiation of this contract and before the attachment of coverage;

(f) That your Korean subsidiary and/or the entity which conducted operations and owned the inventory within the plant in Masan, Korea was placed into liquidation and the plant itself was being liquidated as a result of your labor problems and your inability to obtain access to your own facilities or otherwise safeguard the property for which you requested insurance.

Those and other matters, perhaps not yet discovered by GSIC, if true, were material facts which should have been, but were not, disclosed to the Underwriters at the time of negotiations of this contract of insurance and which, if they had been disclosed, may have materially affected the decision of Underwriters to enter into the contract for the premium charged.

2. The underwriting submission of Alexander & Alexander of Texas, Inc. dated April 26, 1989 with respect to the warehouse assembly operations represented that, "there have been no losses at any of the warehouse/assembly operations". Given the points raised above, we have reason to suspect whether or not that representation of prior loss history which formed a part of the inducement to GSIC to enter into the contract of insurance was accurate. Underwriters reserve their rights to investigate that and any other representations of Alexander & Alexander at the time of the negotiations of this insurance to determine whether they were accurate or misleading and, if misleading, whether they were material to the underwriting decision.

3. At the time Alexander & Alexander of Texas, Inc. made their presentation by letter dated April 26, 1989, GSIC was asked to offer insurance coverage in competition for your then existing insurance which was represented as being in force and effect with Mutual Marine Office, Inc. More specifically, in its letter of April 26, 1989, Alexander & Alexander stated:

> The Policy for InterTAN is reasonably "plain vanilla". The Policy for A&A International is more complex. In addition to the Ocean/Air coverage, the Policy has been expanded (just done recently and endorsements, etc. not received yet). It is extended to cover inventory consisting of raw materials, parts and accessories provided by suppliers of all descriptions, work in process and finished goods while in the following Countries: Korea, Taiwan, Hong Kong, Guang Dong (Republic of China) and Japan. Hong Kong is transit only since a separate policy covers the warehouse. Perils insured are all risk including flood and earthquake, inland/ocean/air from point of supply or where the insured has an insurable interest in goods, through assembly, warehousing and ocean/air to final port destination. The limits of liability needed for land operations are $10 million for all Countries except Japan where $25 million is needed for the consolidation warehouses. Earthquake is limited to $10 million everywhere. The ocean/air limit is $7,500,000 for each entity. Please quote a $10 million limit for ocean/air."

GSIC questions the accuracy of the representations of then existing coverage contained in that letter and reserves its rights to investigate those representations

further and determine their materiality to the Underwriters who were asked to quote on the proposed insurance contract.

4. GSIC also invites your attention to paragraph 5 on the cover page of the Policy under the title "Notice" which reads as follows:

> 5. In the event of any known or reported loss or damage the nearest Settling Agent, Claims Agent, or Company Representative, should be notified promptly to protect the interest of all concerned. If no such party is available, then prompt notice should be given to the nearest Correspondent to the American Institute of Marine Underwriters or to the nearest accredited representative of Lloyd's, London.

If this Policy attached, and other incidents occurred during the period that your representatives were not able to get into the plant, Tandy Corporation may have failed to give notice timely of such incidents. To the extent the notice was not given in compliance with the Policy provisions, GSIC reserves all of its rights and defenses. GSIC also reserves all rights to determine the number of any applicable occurrences, the amounts of losses per occurrence and how many deductibles should be applicable.

5. Paragraph 47 of the Policy, entitled "Other Insurance", provides that:

> It is hereby further agreed that if the said ASSURED shall have made any other insurance upon the property aforesaid, prior and date to this Policy, then this company shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully

covering the property hereby insured and this Company shall return the premium upon so much of the sum by it insured as is (sic) shall be exonerated from by such prior insurance period.

In case of any insurance upon said property subsequent in date to this Policy, this Company shall nevertheless be answerable for the full extent of the sum by it subscribed hereto, without right to or claim contribution from said subsequent insurers, and shall accordingly be entitled to retain the premium by it received in the same manner as if no such subsequent insurance had been made.

Other insurance upon the property aforesaid, of date the same as this Policy, shall be deemed simultaneously with and this Company shall not be liable for more than a rightable contribution and the proportion the sum by its insured bears to the aggregate of such simultaneous insurance and will return to the Assured an amount of premium proportionate to such reduction in liability.

To the extent that there is coverage for this loss under any other insurance policies, GSIC reserves all of its rights and defenses, or other appropriate policy provisions.

GSIC will require a full investigation into all material issues relating to the original broking and placement of this cover with respect to the Korean operation of Tandy Corporation and reserves all rights and defenses in any way related to any misstatements or nondisclosures of material facts both during and after the broking of the coverage. Since questions of nondisclosure of information are involved, GSIC must reserve its rights and defenses arising out of any additional material facts known to

Tandy Corporation and its agents which may hereafter be discovered by GSIC. Therefore, any action heretofore or hereafter taken by GSIC in the monitoring and investigation of this claim shall in no event be construed to be a waiver or abandonment of any coverage defenses. The purpose of this reservation of rights letter is to allow GSIC to investigate the occurrence you have reported, and to respond without waiving any of its coverage or policy defenses. The investigation could result in a denial of coverage under the captioned Policy.

If you have any questions regarding the broking of this Policy, the efforts to enter into the contract of insurance, any coverages possibly afforded under the Policy, or the effect of this reservation of rights letter, GSIC urges you to consult counsel of your choosing about these matters. It is the intention of this reservation of rights letter to permit a full investigation and response to your notice without in any way affecting, impairing, or waiving any of the rights of GSIC or of Tandy Corporation.

Sincerely,

Ms. Dianne Furgerson
Vice President
A I Marine Adjusters, Inc.
as Claims Agent for
Granite State Insurance Company

EXHIBIT D

Logo
AI Marine Adjusters, Inc.
American International Building
2200 North Loop West, Suite 200
Houston, Texas 77018
713/683-4500 Telex #361865

March 20, 1990
Direct Dial: 713/683-4531

Messrs. Don Martin
Ron Snyder
Alexander & Alexander
P.O. Box 2950
Fort Worth, Texas 76113

Re: Claim No.:	6-55848
Insured:	Tandy Corporation, et al
Policy No.:	AIU 24-60684
Issuer:	Granite State Insurance Company
Date of Loss:	Unknown
Nature of Claim:	Vandalism
Location:	Korea

Gentlemen:

This letter is written subject to our reservation of all rights on behalf of Granite State Insurance Company in my letter to Tandy Corporation of February 2, 1990.

Following your first notice of loss, we have received no further information of significance from you or Tandy Corporation which would enable us to identify or determine the value of the property at risk or attempt to

evaluate what rights Tandy may have under the policy , or to determine the character and value of the claim(s) being presented. Therefore, to assist you in furnishing us with what we need from your principal, please provide the following:

1. Granite State's Marine Open Cargo Policy became effective June 22, 1989. You have advised us that a claim or claims will be made for vandalism and damage to inventories, etc. in Tandy's Korean assembly facilities. Presumably Tandy's claim will be under Endorsement 2 to the Marine Open Cargo Policy. Please confirm that is correct or advise under what other section of the policy the claim will be made.

2. Endorsement No. 2 requires "quarterly reports of values to be made and premium paid on average quarterly values @ $.015 per 100 per month subject to a maximum quarterly average value of $10 million for any location." To date we have received no quarterly reports, no premium has been paid, and no description has been provided of however many facilities Tandy may have had in Korea, whether or not all of those facilities were involved in the labor dispute. Therefore, please provide us with the following identification of what Tandy has intended to insure: (Since we do not know how Tandy operated in Korea, we use the same "Tandy" to refer to any entity in which Tandy Corp. claims an insurable interest and ask that you please identify each specific entity in your answers to these questions.)

a. A complete physical description of each location in which any Tandy entity had a financial or insurable interest in Korea.

b. The required quarterly reports of property intended to be insured and identification of each Korean facility at which that property was located during the policy period.

c. Since Tandy has made no premium payment, and since we issued our reservation of rights letter, we do not now make demand upon Tandy for payment of premium due. However, I note that premium was to have been paid quarterly; that it has not been paid as required by the contract of insurance; and that you may wish to submit a calculation of premium due, (if not a tender of premium, subject to Granite State's acceptance or refusal of that tender).

3. Please provide the complete Mutual Marine Office, Inc. policy covering the insured prior to the effective date of our policy referred to above. I believe that policy is numbered MMO-90174. Please insure that you attach all endorsements to the Mutual Marine policy.

4. For each location in which Tandy possessed an insurable interest in the property or inventory in Korea, please provide the following:

a. The full name and address of the individual or legal entity which owned the building or facility.

b. The full name and address of the Tandy company which had an interest in that building or facility.

c. A full description of the contractual arrangement(s) between the Tandy company involved and the building's owner permitting Tandy to lease, occupy and/or operate within that building or facility.

d. A similar description of any other contracts between the Tandy company involved and any third parties appropriate to the lease or operation arrangement(s).

5. Please provide a reasonable complete narrative description of how Tandy operated within each location, including:

a. A description of the contractual arrangements by which Tandy procured raw materials, parts and accessories from suppliers and how and when Tandy became the owner or otherwise acquired an insurable interest in the property so acquired.

b. A description of what work was done by Tandy's own employees with the raw materials within each of the operating facilities.

c. A narrative description of how, and under what circumstances Tandy would consign or "farm out" materials or work in progress to subcontractors (if any) for further assembly and shipment and/or for return to Tandy's facilities for additional further processing. Did those arrangements involve transfers of ownership of the property involved and, if so, when and where was ownership transferred?

6. Please provide a complete inventory of raw materials, parts and accessories, work in process and finished goods while owned by Tandy or during such times as Tandy may wish to claim an insurable interest in that material. In this regard, since we know so little of the nature of the Tandy operation, we do not know what documentation would have been generated by Tandy and/or its suppliers and/or subcontractors. Therefore,

we call upon Tandy to provide full documentation showing its purchase of raw materials, the chain of care, custody and control of the materials, and to separate any property which may have been physically present in the plant(s) in which vandalism damage occurred, from property not yet received by Tandy, consigned elsewhere or stored elsewhere.

7. Please provide an inventory of all items for which Tandy claims a loss under the policy, including a description of where those items were physically located at the time the loss is claimed, and what damage occurred to that property. Please provide us with photographs or other reasonable documentation evidencing the actual loss since, by the time we received notice of this casualty, we were informed that the plant had been closed, and all materials already had been shipped out or sold for salvage.

8. Since we understand some of the property was sold for salvage, we ask for an inventory of that property which was sold, a description of which items were "inventory and work in progress" as opposed to plant or office equipment, the values of the property involved, and an explanation of why it was sold. That is, was it sold because it was damaged, because it was no longer useful to Tandy, or for some other reason? Please provide support for the original cost and the cost received on resale of all materials thought to be insured under this policy which were sold to third parties in Korea either for salvage or for any other purpose.

9. We understand that Tandy may have moved out of Korea so quickly that a lot of property was simply

abandoned. Would you please provide an inventory and valuation of any properties thought to be insured under this policy which were abandoned and an explanation of why the property was abandoned and why Tandy departed Korea in apparent haste. What efforts were made to obtain the assistance of third parties to arrange to inventory, pack and ship properties which Tandy abandoned?

10. Please advise whether or not any inventories, raw materials, etc. reportedly insured under this policy were moved to any other facility owned or operated by Tandy, or in which Tandy had a financial interest inside of Korea. If so, describe fully the circumstances of such movements, the value of the materials when purchased by Tandy, any values obtained by Tandy for the transferred goods and why other goods could not also have been transferred to Tandy's other facilities in Korea.

11. Please provide copies of all demands, correspondence, and complaints to Tandy from your labor force in Korea, and any responses, pertaining to the labor problems experienced by Tandy in Korea, from the first such demand through Tandy's departure from Korea.

12. Please provide copies of all correspondence, notes, or memoranda of communications by and between Tandy and any Korean government ministry of trade, labor, commerce, or other government body, at either national or local levels, purporting to discuss Tandy's labor problems at any time.

13. Please provide copies of all correspondence, notes, or memoranda of communications between Tandy

and the United States Embassy, Consulates, or trade missions or organizations in Korea protesting, reporting or requesting assistance or otherwise discussing Tandy's labor problems, at any time.

14. Please provide a chronology of events of Tandy's labor disputes with the date and character of any disruptive event, the date and location of each occurrence in which property thought to be insured under this policy suffered loss and an inventory and list of values of such property as was lost or damaged at each time.

15. Please describe the date and circumstances and duration of each occupation of Tandy facilities by strikers and an inventory of any insured damaged property damaged during such occupation.

16. Please provide copies of any formal police complaints, law suits, or writs or protective orders obtained by Tandy from local authorities and/or the courts in Korea directing that the strikers, cease, desist, or evacuate the premises taken over from Tandy.

17. Please describe how Tandy regained control of its facilities, if it did, and the reasons why Tandy did not then resume normal operations at those facilities.

18. Please identify the dates on which Tandy took the following actions or those events occurred:

a. Tandy decided to slow or curtail its operations in Korea because of the labor unrest. Who made that decision?

b. Tandy made the decision to close its facility or facilities in Korea.

c. Tandy effectively closed its facility or facilities in Korea.

d. When the strikers or laborers took over the Tandy facility and duration time for each episode in which the strikers occupied Tandy facilities.

e. Describe the date and substance of each effort made by Tandy to regain control of its facilities.

f. State when Tandy actually regained control of its facility/facilities and describe any restrictions imposed by the courts, police or other authorities in Korea on the duration of time Tandy could retain control.

19. What other legal or practical restrictions were there, if any, requiring Tandy to pack and ship its property in haste, rather than in an orderly withdrawal.

20. What has been done with the property evacuated from Korea? That is, has it been forwarded to other Tandy facilities, sold to third parties, or is it still in Tandy's manufacturing "pipeline"?

Once again, many of these questions have been asked simply because we have no other information at the moment, and in an effort to provide guidance to the type of information we will need to have to examine your claim. These requests are not intended to be exclusive and we reserve the right to make other and further requests once we are able to obtain a better concept of how Tandy was operating and the details of the experiences involved. We do not intend these requests to be burdensome, although we realize they are numerous. If Tandy has already obtained or provided materials which substantially answer the questions in perhaps a different

form, we would be pleased to consider whatever Tandy wishes to submit.

Please understand that Tandy is considered a very valued client of our company and that, by making these requests, we are attempting to provide you with some guidance of the type of material and/or information which may assist Tandy in preparing its own claim. However, we do not by these requests intend to take from Tandy the responsibility it has for preparing and submitting proper claims documentation.

Sincerely,

Ms. Dianne Furgerson
Vice President
A.I. Marine Adjusters, Inc.
as Claim Agents for
Granite State Insurance Company

DF/pg

EXHIBIT E

Tandy Corporation

Executive Offices 1700 One Tandy Center
Post Office Box 17180
Fort Worth, Texas 76102
Telephone (817) 390-3700

Jim Ashworth
Assistant Director
Risk Management
390-3044

AIRBORNE EXPRESS

November 28, 1990

Mr. R.C. Danen
Regional Claim Manager
AMERICAN INTERNATIONAL COMPANIES
1999 Bryan Street
Dallas, TX 75201

RE: Claim No: 90-20644
Insured: Tandy Corp/TC
Electronics – Korea
D/L: On or about 12/22/89

Dear Mr. Danen:

Enclosed is our Proof of Loss regarding the above-captioned claim. With a copy of this letter, I am also sending another Proof of Loss to Al Marine in Houston, as it is our position that the Marine Open Cargo policy issued by Granite State Insurance Company covers a portion of this loss.

Sincerely,

/s/ Jim Ashworth
Jim Ashworth

JHA/jlj

cc: Ron Snyder, Sr. Vice President
ALEXANDER & ALEXANDER OF TEXAS

Don Martin, Vice President
ALEXANDER & ALEXANDER OF TEXAS

Diane Furgerson, Vice President
AI MARINE ADJUSTERS, INC.
2200 North Loop West,
Suite 200
Houston, TX 76113

SWORN STATEMENT
IN
PROOF OF LOSS

Policy No.
AIU 24-60684

Amount Of Policy At Time Of Loss

$10,000,000.00

Date Issued
6/22/89

Date Expires
CONTINUOUS UNTIL CANCELLED

6-55848
Company Claim No.
ALEXANDER & ALEXANDER OF TEXAS
Agent

FORT WORTH, TX
Agency At

To the GRANITE STATE INSURANCE COMPANY

of MANCHESTER, NEW HAMPSHIRE

At time of loss, by the above indicated policy of insurance, you insured –

TANDY CORPORATION/TCE – KOREA

against loss by STRIKE, RIOT, CIVIL COMMOTION AND OTHER PERILS to the property described according to the terms and conditions of said policy and of all forms, endorsements, transfers and assignments attached thereto.

TIME AND ORIGIN	A PROPERTY loss occurred about the hour of ___ o'clock ___ M., on the 22 day of DECEMBER 1989, the cause and origin of the said loss were: DAMAGE AND THEFT CAUSED BY STRIKERS
OCCUPANCY	The building described, or containing the property described, was occupied at the time of the loss as follows, and for no other purpose whatever: MANUFACTURE OF CONSUMER ELECTRONICS
TITLE AND INTEREST	At the time of the loss, the interest of your insured in the property described therein was OWNERSHIP. No other person or persons had any interest therein or incumbrance thereon, except: NONE
CHANGES	Since the said policy was issued, there has been no assignment thereof, or change of interest, use, occupancy, possession, location or exposure of the property described, except NONE

TOTAL INSURANCE	THE TOTAL AMOUNT OF INSURANCE upon the property described by this policy was, at the time of the loss, $10,000,000.00, as more particularly specified in the apportionment attached, besides which there was no policy or other contract of insurance, written or oral, valid or invalid.
VALUE	THE ACTUAL CASH VALUE of said property at the time of the loss was ..... $UNDETERMINED
LOSS	THE WHOLE LOSS AND DAMAGE was $10,612,993.00
AMOUNT CLAIMED	THE AMOUNT CLAIMED under the above numbered policy is $10,000,000.00
STATEMENTS OF INSURED	The said loss did not originate by any act, design or procurement on the part of your insured, or this affiant; nothing has been done by or with the privity or consent of your insured or this affiant, to violate the conditions of the policy, or render it void; no articles are mentioned herein or in annexed schedules but such as were destroyed or damaged at the time of said loss; no property saved has in any manner been concealed, and no attempt to deceive the said company, as to the extent of said loss, has in any manner been made. Any other information that may be required will be furnished and considered a part of this proof.

The furnishing of this blank or the preparation of proofs by a representative of the above insurance company is not a waiver of any of its rights.

State of TEXAS

County of TARRANT

TANDY CORPORATION

BY: /s/ Jim Ashworth
Insured

Subscribed and sworn to before me this 28th day of NOVEMBER, 1990

SEAL
JANET L. JOHN
Notary Public State of Texas
My Commission Expires Mar 2, 1993

Notary Public

Form recommended by the
American Insurance Association
[Form number illegible.]

EXHIBIT F

Logo
AI Marine Adjusters, Inc.
675 Bering Drive, Suite 600
Houston, Texas 77057
713/268-8600 Telex #361885

"VIA FACSIMILE"

Direct Dial: 713/268-8662

December 14, 1990

Mr. Jim Ashworth
Assistant Director, Risk Management
Tandy Corporation
P.O. Box 17180
Fort Worth, Texas 76102

Re: Granite State Insurance Company
Policy No.: AIU 24-60684
Insured: Tandy Corporation/T.C. Electronics — Korea
D/L: On or about 12/22/89

Dear Mr. Ashworth:

This will acknowledge receipt of a copy addressed to me of your letter of November 28, 1990 to Mr. R. C. Danen, American International Companies' Dallas. Your letter attached a Sworn Statement In Proof of Loss against Granite State Insurance Company's policy no. AIU 24-60684 for $10 million.

Insofar as your letter purports to provide a Sworn Statement in Proof of Loss against Granite State Insurance Company's policy no. AIU 24-60684, please be advised

that we consider the proof of loss wholly inadequate, and of no value whatsoever.

Your attention is invited to paragraphs 48, 49, 50 and 51 of Granite State Insurance Company's policy no. AIU 24-60684. in particular, proper proof of loss and proper proof of interest in the goods or merchandise so involved is required on a timely basis.

Following receipt of the first notice of loss from Tandy Corporation, and after discussions with your agents, I wrote to them on March 20, 1990 describing the detailed information we would require to consider your claim. A substantial effort went into preparing that list of what information would be required, based upon the information available to us then. Yet, to this day, neither Tandy Corporation nor your agents have responded. A copy of my letter of March 20, 1990 is attached for your information.

Under the circumstances, I must repeat th[illegible] completely unsupported Sworn Statement In Pro[illegible] Loss which you have submitted, addressed to Granite State Insurance Company, is totally unacceptable. Tandy Corporation will be expected to comply with policy terms and conditions.

Sincerely,

/s/ Dianne Furgerson
Ms. Dianne Furgerson
Vice President
A. I. Marine Adjusters, Inc.
as Claims Agents for Granite State Insurance Company

Enclosure

cc: Mr. Ron Snyder, Sr. Vice President
Alexander & Alexander of Texas, Inc.

Mr. Don Martin, Vice President
Alexander & Alexander of Texas, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GRANITE STATE INSURANCE COMPANY Plaintiff, VS. TANDY CORPORATION and T. C. ELECTRONICS (KOREA) LTD., Defendants	§ § § § § § § § § § §	C. A. NO. H-91-213 RULE 9(H) ADMIRALTY CLAIM

TANDY CORPORATION AND T. C. ELECTRONICS (KOREA) LTD.'S ANSWER TO COMPLAINT FOR DECLARATORY JUDGMENT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

COME NOW Defendants Tandy Corporation and T. C. Electronics (Korea) Ltd.'s (hereinafter collectively referred to as "Defendants"), without waiving their right to assert counterclaims should the Court deny the Motion to Dismiss or in the Alternative, Motion for Abatement of Proceedings being filed contemporaneously herein, and file this their Answer to the Complaint for Declaratory Judgment of Plaintiff Granite State Insurance Company ("GSIC"), respectfully showing the Court as follows:

I

THE ACTION

This is a response to a declaratory judgment action filed by GSIC pursuant to 28 U.S.C. § 2201 *et seq.*

II.

THE PARTIES

The Defendant Tandy admits it is a Delaware corporation with its principal place of business in Fort Worth, Texas. Defendant TCEK was a Tandy subsidiary incorporated under the laws of a Korean corporation with its principal place of business in Masan, Korea prior to its dissolution in 1990. While TCEK and Tandy deny that they are alter egos of each other for the purposes of this lawsuit or for any other purpose, Tandy has acceded to all rights in dispute under the GSIC policy of insurance that is the subject of this suit. Plaintiff GSIC is a New Hampshire corporation. The principal place of business of GSIC cannot be determined at this time.

III.

JURISDICTION

A. Admiralty Jurisdiction Should Not Apply

Defendants deny that this claim comes within the admiralty or maritime jurisdiction of this honorable Court. This case involves a question relating to insurance policy coverage for inventory consisting of raw materials, parts, accessories provided by suppliers of all descriptions, work in progress and finished goods while in the

following countries: Korea, Republic of China, Taiwan, and Hong Kong.

B. Diversity Jurisdiction

Defendants cannot admit or deny that diversity jurisdiction exists at this time. The assertions of GSIC with regard to diversity will be the subject of discovery. Additionally, based on the Complaint of GSIC, it appears that there are necessary parties to this case that have inexplicably not been joined, e.g. Alexander & Alexander of Texas, Inc. ("A&A"), Mutual Marine Office, Inc. ("MMO") and Utica Mutual Insurance Company ("Utica"). Their joinder may prevent diversity.

IV.

APPLICABLE LAW

Defendants deny that the law and customs of England apply. Defendants deny that maritime law of the United States applies. Defendants contend that law of the State of Texas, with regard to the contract, is the applicable law.

V.

STATEMENT OF THE FACTS

The Parties

1. TCEK admits that it was a subsidiary or affiliate of Tandy for the relevant period at issue in this case. TCEK admits that it has purchased insurance. Tandy admits it is a large corporation with considerable assets

and a substantial number of employees. Tandy admits it manufactures custom electronic products and sells them through its Radio Shack network as well as through other outlets. Tandy admits that it has a full time in-house corporate risk manager who is responsible for purchasing insurance for the worldwide requirements of Tandy and its affiliates. Tandy admits that A&A acted as Tandy's outside insurance agent in connection with the GSIC open cargo policy. Defendants admit the allegations set forth in paragraph 2 of GSIC's Complaint for Declaratory Judgment.

The Policy Negotiations

3. Defendants have insufficient knowledge, at this time, to form a belief as to the truth of the allegations set forth in paragraph 3 of GSIC's Complaint for Declaratory Judgment and therefore deny the same.

4. Defendants have insufficient knowledge, at this time, to form a belief as to the truth of the allegations set forth in paragraph 4 of GSIC's Complaint for Declaratory Judgment and therefore deny the same.

5. Defendants have insufficient knowledge, at this time, to form a belief as to the truth of the allegations set forth in paragraph 5 of GSIC's Complaint for Declaratory Judgment though Tandy is in possession of a copy of the April 26, 1989 letter from A&A to American International Marine Agency, Inc.

6. Defendants have insufficient knowledge, at this time, to form a belief as to the truth of the allegations set

forth in paragraph 6 of GSIC's Complaint for Declaratory Judgment and therefore deny the same.

7. Defendants admit the allegations set forth in the first two sentences of paragraph 7 of GSIC's Complaint for Declaratory Judgment. Defendants have insufficient knowledge to form a belief as to the truth of allegations set forth in the last sentence of paragraph 7 of GSIC's Complaint for Declaratory Judgment and therefore deny the same.

8. Defendants have insufficient knowledge to form a belief to the truth of allegations set forth in the first sentence of paragraph 8 of GSIC's Complaint for Declaratory Judgment therefore deny those allegations. Defendants admit the allegations of the last sentence of paragraph 8 of GSIC's Complaint of Declaratory Judgment.

9. Defendants deny the allegations set forth in paragraph 9 of GSIC's Complaint for Declaratory Judgment.

10. Defendants deny the allegations set forth in paragraph 10 of GSIC's Complaint for Declaratory Judgment.

The Policy

11. Defendants deny the allegations set forth in paragraph 11 of GSIC's Complaint for Declaratory Judgment and its conclusions regarding the characterization of policy clauses and legal conclusions attendant thereto.

12. Defendants have insufficient knowledge to form a belief as to the truth of allegations set forth in paragraph 12 of GSIC's Complaint for Declaratory Judgment therefore deny those allegations.

13. Defendants admit the allegations set forth in paragraph 13 of GSIC's Complaint for Declaratory Judgment.

14. Defendants admit that TCEK experienced labor problems at the plant during 1989. Further, Defendants admit that rioters took possession of the plant. Defendants deny all other allegations set forth in paragraph 14 of GSIC's Complaint for Declaratory Judgment.

15. Defendants deny the allegations set forth in paragraph 15 of GSIC's Complaint for Declaratory Judgment.

16. Defendants deny the allegations set forth in paragraph 16 of GSIC's Complaint for Declaratory Judgment, except to the extent Tandy determined to close the Korean facility.

17. Defendants deny the allegations set forth in paragraph 17 of GSIC's Complaint for Declaratory Judgment.

18. Defendants admit the allegations set forth in paragraph 18 of GSIC's Complaint for Declaratory Judgment.

19. Defendants admit the allegations set forth in paragraph 19 of GSIC's Complaint for Declaratory Judgment.

20. Defendants deny the specific allegations set forth in paragraph 20 of GSIC's Complaint for Declaratory Judgment, except to the extent such allegations are a matter of Korean public record.

21. Defendants admit the allegations set forth in paragraph 21 of GSIC's Complaint for Declaratory Judgment.

22. Defendants deny the allegations set forth in paragraph 22 of GSIC's Complaint for Declaratory Judgment.

23. Defendants deny the allegations set forth in paragraph 23 of GSIC's Complaint for Declaratory Judgment.

24. Defendants admit the allegations set forth in the first four sentences of paragraph 24 of GSIC's Complaint for Declaratory Judgment though they cannot at this time admit or deny the dates set forth in such allegations.

25. Defendants deny the allegations set forth in paragraph 25 of GSIC's Complaint for Declaratory Judgment.

26. Defendants deny the allegations set forth in paragraph 26 of GSIC's Complaint for Declaratory Judgment.

27. Defendants admit the allegations set forth in the first sentence of paragraph 27 of GSIC's Complaint for Declaratory Judgment. Defendants deny all other allegations set forth in paragraph 27 of GSIC's Complaint for Declaratory Judgment.

28. Defendants deny all allegations set forth in paragraph 28 of GSIC's Complaint for Declaratory Judgment.

29. Defendants admit the allegations set forth in the first three sentences of paragraph 29 of GSIC's Complaint for Declaratory Judgment. Defendants admit that the AIM adjusters raised several questions regarding non-disclosure of material facts in a letter attached to the GSIC Complaint for Declaratory Judgment as Exhibit "C." Defendants deny that there is any merit to the questions raised in Exhibit "C" attached to GSIC's Complaint for Declaratory Judgment. Defendants therefore deny all other allegations set forth in paragraph 29 of GSIC's Complaint for Declaratory Judgment.

30. Defendants admit the allegations set forth in paragraph 30 of GSIC's Complaint for Declaratory Judgment.

VI.

CAUSE OF ACTION

31. Defendants incorporate and reaffirm their responses to paragraphs 1 through 30 as set forth below.

32. Defendants deny that the terms of the policy require application of English law or general maritime law of the United States.

33. Defendants deny the allegations set forth in paragraph 33 of GSIC's Complaint for Declaratory Judgment and disputes the conclusions of law contained therein.

34. Defendants deny the allegations set forth in paragraph 34 of GSIC's Complaint for Declaratory Judgment.

35. Defendants admit that a justiciable controversy exists between the parties. Defendants deny that the issues presented by GSIC in paragraph 35 of its Complaint for Declaratory Judgment are the correct issues. Rather, Tandy has correctly formed the issues with all parties joined needed for a full adjudication of the dispute in the suit it filed on February 15, 1991 in the 96th Judicial District Court of Tarrant County, Texas.

36. Defendants oppose the relief sought by GSIC in paragraph 36 of its Complaint for Declaratory Judgment.

37. By way of affirmative defense, Defendants would show that GSIC's bad faith handling and investigation of the claim made by Defendants was of such a nature to estop GSIC from obtaining the relief it seeks in its Complaint for Declaratory Judgment.

38. Additionally, pursuant to 28 U.S.C. § 2202, the Defendants are entitled to further relief, including its reasonable and necessary attorneys' fees and costs expended in this cause.

WHEREFORE, PREMISES CONSIDERED, Defendants respectfully request that this Court deny the relief sought by GSIC and abate this case as sought by Defendants. Alternatively, Defendants ask that this Court enter

a Judgment denying the relief sought by GSIC and grant Judgment against GSIC for the benefit of Defendants.

Respectfully submitted,

By: /s/ John D. White/blo
John D. White
State Bar No. 21311500
Attorney in Charge for Defendants

Mark C. Hill
State Bar No. 09647400

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OF COUNSEL:

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served on the attorneys of record for all parties to the above cause in accordance with the Federal Rules of Civil Procedure on the 19th day of February, 1991.

/s/ John D. White/blo
John D. White

(5)

No. 91-2086

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GRANITE STATE INSURANCE COMPANY,
Petitioner,

v.

TANDY CORPORATION AND
T. C. ELECTRONICS (KOREA) LTD.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED

I. Does the "exceptional circumstances" test for federal abstention apply to declaratory judgment actions?

II. Does application of the *Colorado River* factors in and of themselves result in favoring abstention in declaratory judgment actions?

III. Should a trial court's decision to abstain in a declaratory judgment action be reviewed *de novo* or by an abuse of discretion standard?

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BRIEF OF RESPONDENTS

The respondents, Tandy Corporation and T.C. Electronics (Korea), Ltd.,[1] file this brief in opposition to the brief of petitioners, Granite State Insurance.

STATEMENT OF THE CASE

Granite State Insurance Company would have the Court believe that its preemptive declaratory judgment suit was an act of

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[1] A listing naming all parent companies and subsidiaries of Tandy Corporation and T. C. Electronics (Korea) Ltd., has been made in footnote #1 of Respondents' Response to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, which was previously filed.

last resort when faced with a recalcitrant insured. Nothing could be farther from the truth.

In January, 1990, within days of confirming that insured losses had been sustained at its plant in Masan, Korea, Tandy Corporation gave notice of this loss to Granite State as well as to other involved insurers. (R.II,175)(J.A.17).[2] Granite State's response was swift. Within days, it issued a reservation of rights letter in which it set forth the basis upon which it later claimed it was entitled to relief in its later filed declaratory judgment suit. (J.A. 90-98) Simultaneously, Granite State surreptitiously employed attorneys and ex-CIA agents to find some way, indeed any way, to avoid its contractual obligations.

The particular insurance involved was a warehouse endorsement to a global marine policy that provided coverage for inventory at a number of inland locations around the world, including inventory located at Tandy's Massan, Korea plant. (J.A. 26-83). The losses sustained by Tandy occurred during the policy period in which Granite State insured this inventory. It should be noted, however, that Tandy had the identical coverage with Utica Mutual Insurance Company before inception of the Granite State policy. Granite State's policy of insurance was not new coverage but simply was replacement coverage for the policy previously issued by UTICA. After notifying the insurers of the substantial losses it had sustained, Tandy went about the business of gathering information necessary to quantify the loss for its insurers. Tens of thousands of documents were produced and adjustors and accountants representing American International Underwriters Corporation (AIU), as well as representatives of Alexander & Alexander of Texas, Inc. (A & A), spent weeks in the Far East investigating the loss. The conduct of Tandy of providing information to AIU and A & A was not only consistent with its

[2] Record references are cited as "R.II ___." The Joint Appendix filed in this case is cited as "J.A. ___"

obligations under its policy of insurance with Granite State, it was mandated. Specifically, the insurance policy provides:

> In cases of loss or other claim such loss or claim to be paid within thirty (30) days after submission to the Company or to the
>
> AMERICAN INTERNATIONAL UNDERWRITERS CORPORATION AND/OR ALEXANDER & ALEXANDER OF TEXAS, INC.
>
> of proper proof of loss . . . . (J.A. 53).

This effort to quantify the loss took months. During this period, as part of its scheme to bolster the "defenses" that it concocted immediately upon receiving notice of the loss, Granite State wished to ignore receipt of information by A & A and AIU, who under Granite State's policy were the appropriate alternative entities to receive that information. Furthermore, Granite State had made the decision, certainly by March of 1990, that it would not honor Tandy's claim under any set of circumstances, despite knowing full well that Tandy was diligently attempting to quantify that claim for submission to the company.

In December, 1990, Tandy filed its claim with Granite State for the policy limits of $10,000,000, which represented damage to insured property and but only a fraction of Tandy's total economic loss. (R.II,43,186). Granite State did not honor or deny the claim within thirty days of its receipt.

Instead, it brought suit in the United States District Court for the Southern District of Texas, Houston Division, seeking a declaratory judgment alleging, *inter alia*: (1) that A & A, a Dallas-based Texas corporation, who was the broker and only entity that dealt with Granite State at the time of the issuance of the policy, had made misrepresentations or failed to disclose material facts that Granite State believed voided the policy *ab initio*; and (2) that the losses that Tandy undoubtedly sustained

were losses occurring before the effective date of the Granite State policy and would be covered, if at all, under the policy issued by UTICA, Tandy's prior carrier. (J.A. 3-22). Granite State, in effect, was seeking a declaration that Tandy's losses were not its problem, but were the problem of either A & A or UTICA.

The lengthy complaint filed by Granite State in the district court went into substantial detail concerning why it believed its policy was void, and contained numerous allegations that "Tandy and/or A & A" made misrepresentations or failed to disclose material facts at the time the Granite State policy was issued. (J.A. 19). As Granite State well knew, no employee of Tandy had any contact whatsoever with the underwriters for Granite State. All communications were between Granite State's Houston-based underwriters and A & A. The allegations in Granite State's declaratory judgment suit virtually mirrored the "defenses" it raised in its reservation of rights letter.

Granite State's declaratory judgment suit left Tandy with no choice. For the dispute to be fully resolved, it was necessary for Tandy to bring suit against Granite State, as well as A & A and UTICA, so that the party responsible for Tandy's losses could be identified and liability assessed. (R.II,99). The declaratory judgment suit filed by Granite State could not offer Tandy full relief nor could it even fully resolve the very issues that Granite State raised in its declaratory judgment suit. All parties necessary for a complete adjudication were not present in the district court, nor could they be.[3]

Simultaneously with the filing of the state court action in Tarrant County, Texas, Tandy answered Granite State's complaint and filed a motion asking the district court to decline to exercise its discretionary jurisdiction over Granite State's action

[3] Joinder of A & A and UTICA due to the citizenship of the parties involved was not an option as a result of 28 U.S.C. 1367(b) (Supp. 1992) because joinder would have destroyed the jurisdictional requirements of 28 U.S.C. § 1332 (Supp. 1992).

for declaratory relief and to dismiss or stay that suit until resolution of the state action. Recognizing Granite State's action as the preemptive strike it now unabashedly admits (Pet. brief at 33-35), the district court, applying the standards set forth in *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800 (1976); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1 (1983); and *Brillhart v. Excess Ins. Co. of Am.,* 316 U.S. 491 (1942), stayed this suit pending resolution of the state district court action.

The United States Court of Appeals, in affirming the district court, held that the district court did not abuse its discretion in granting the stay, and noted that state law, not maritime law, would likely apply to this dispute.

SUMMARY OF ARGUMENT

For historical, legal and policy reasons, a federal district court should have broad discretion to refuse to entertain a declaratory judgment action if there is a pending state action in which all issues can effectively be determined.

The judicially-formed "exceptional circumstances" test, which normally governs the determination of whether it is proper for a court to abstain, does not apply to declaratory judgment actions. Concerns that federal courts have a virtually unflagging obligation to exercise jurisdiction are irrelevant because Congress created the Declaratory Judgment Act and specifically gave the courts discretion concerning whether to hear declaratory judgment actions.

This Court, in *Brillhart v. Excess Ins. Co. of Am.,* 316 U.S. 491 (1942), determined that a court should not ordinarily exercise its discretion to hear a declaratory judgment action where there is another suit between the parties pending in state court that presents the same issues not governed by federal law.

In this case, Granite State was forum shopping when it filed the federal suit. Because of the tenor of the parties' relations, there can be no dispute that Granite State expected Tandy to file suit if its claims were denied. Rather than deny coverage, Granite State filed this declaratory judgment action. If it proceeded, this action would be duplicative of the state action. Furthermore, parties necessary for full adjudication are absent. Through the mechanism of declaratory relief, this suit could not resolve the issues raised by Granite State's complaint. The state action will.

The facts in this case demonstrate the sound policy reasons for allowing the courts broad discretion: 1) avoidance of having federal courts needlessly determine issues of state law; 2) discouraging litigants from filing declaratory judgment actions as a means of forum shopping; and 3) avoiding duplicative litigation.

In addition, the general abstention factors themselves run substantially parallel to the criteria that have been deemed relevant to a court's determination of whether to accept or decline jurisdiction over a declaratory judgment action. Particularly the concern over the danger of piecemeal litigation weighs in favor of abstention. Nonetheless, as applied to this case, these generally applied factors support abstention.

Finally, regardless of the standard of review applied — *de novo* or abuse of discretion — the appellate courts seem to reach the same result in reviewing the trial courts' decisions to abstain. The distinction appears to be one of form rather than substance. As applied to this case, either standard would have yielded the same result. Even so, all the factors relating to the allowance of broad discretion by the judge support an abuse of discretion standard in reviewing abstention in declaratory judgment actions. The standard is consistent with not only the Declaratory Judgment Act, but common sense. The district courts, in fulfilling whatever obligation they may have to exercise jurisdiction, should not be deprived of the discretion to decline a declaratory judgment

action, when, as here, that action cannot fully and finally resolve all issues in dispute.

ARGUMENT

I. A federal court has the discretion to refuse to entertain a declaratory judgment action if there is a pending state action in which all issues can effectively be determined.

The unique nature of declaratory judgment actions forms the basis for the departure from the general rule disfavoring abstention. *See* 17A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4247 at 118-20 (2nd ed. 1988) (noting the special nature of a declaratory judgment as supporting abstention in a declaratory judgment action). Generally, abstention is disfavored and "exceptional circumstances" are required before abstention is proper. *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800 (1976); *see also Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1 (1983). When an action is one for declaratory judgment, however, the district court should have broad discretion to defer to a similar state action.

A. The Declaratory Judgment Act does not obligate a district court to exercise its jurisdiction in a declaratory judgment action.

Declaratory relief, both by its nature and under the plain language of the Declaratory Judgment Act, 28 U.S.C. § 2201 (1982), is discretionary. *Public Affairs Assocs., Inc. v. Rickover,* 369 U.S. 111, 112 (1962) (per curiam). The Declaratory Judgment Act is an authorization, not a command. It gives federal courts competence to make a declaration of rights; it does not impose a duty to do so. *Id.*; *See also* EDWIN BORCHARD, DECLARATORY JUDGMENTS at 231-41 (2nd ed. 1941). Congress appears explicitly to have authorized the exercise of discretion by

using the word "may" in the Declaratory Judgment Act, 28 U.S.C. § 2201 (1982). David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U.L. Rev. 543, 548 n. 24 (1985) (discussing "traditional" equitable discretion not to proceed). The way to guarantee that district courts retain the discretion afforded under the Act is through analysis under the Act. *Terra Nova Ins. Co. v. 900 Bar, Inc.*, 877 F.2d 1213, 1223 (3rd Cir. 1989).

The legislative history of the Declaratory Judgment Act itself shows that "large discretion is conferred upon the courts as to whether or not they will administer justice by the procedure." *See* H.R. Rep. No. 1264, 73rd Cong., 2nd Sess., at 2 (1934).[4] A district court is under no requirement to hear the declaratory judgment action before it can exercise its discretion to decline to enter the requested relief. The duty of a court to exercise its jurisdiction is not automatic or obligatory. *Brillhart*, 316 U.S. at 491; EDWIN BORCHARD[5], DECLARATORY JUDGMENTS 312-13 (2nd ed. 1941); 10A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE, § 2759 at 644 (1983) (noting that the draftsmen of the Act rejected the view that the terms of Act were mandatory and did not leave any discretion in the court to refuse jurisdiction).

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[4] Granite State's representation of the content of the legislative history is incorrect. Granite State claims that the legislative history of the act "makes it clear that the courts have no discretion to decline to hear a declaratory judgment action, but *must* allow the litigants an opportunity to be heard." (Pet. Brief at 14). Nowhere in the reports cited by Granite State is there any such implied, much less, explicit requirement. The report says the opposite. *See* H.R. Rep. No. 1264, 73rd Cong., 2nd Sess., at 2 (1934). Even so, *Brillhart* puts this issue to rest. *Brillhart*, 316 U.S. at 494.

[5] Edwin Borchard is a co-draftsman of the Uniform Declaratory Judgments Act. Granite State implies that Prof. Borchard supports its position that a district court must hear the declaratory judgment action. The opposite is true. Specifically, Prof. Brochard wrote: "There is nothing automatic or obligatory about the assumption of 'jurisdiction' by a federal court even if the parties are proper and jurisdictional amount present." EDWIN BORCHARD, DECLARATORY JUDGMENTS at 313 (2nd ed. 1941).

The Declaratory Judgment Act is uncommon in that it neither imposes an unflagging duty upon the courts to decide declaratory judgment actions nor grants entitlement to litigants to demand declaratory remedies. *See Green v. Mansour*, 474 U.S. 64, 72 (1985). In declaratory judgment actions, the courts are under no compulsion to exercise their jurisdiction and ultimately, the decision whether to defer to the concurrent jurisdiction of a state court is . . . a matter committed to the district court's discretion. *Brillhart*, 316 U.S. at 494. Thus, a federal court's obligation to decide virtually all questions within its jurisdiction is curtailed when complainants seek declaratory relief. *See generally* Edwin Borchard, *Discretion to Refuse Jurisdiction of Actions for Declaratory Judgments*, 26 Minn. L. Rev. 677 (1942).

In addition, the reason that the "exceptional circumstances" test does not apply to declaratory judgment actions arises from the genesis of *Colorado River* and *Moses H. Cone*, as opposed to the origin of the Declaratory Judgment Act. One court determined that the importance of *Colorado River* and *Moses H. Cone* "lay in the fact that the Supreme Court gave its imprimatur to a judicially formed rule of abstention based mainly on notions of judicial economy in an era of severely crowded federal dockets." *U.S. Fidelity & Guar. v. Algernon-Blair, Inc.*, 705 F. Supp. 1507, 1521 (M.D. Ala. 1988); *see also* Howard A. Davis, *The Doctrine of Abstention to Promote Judicial Administration*, 33 Trial Law. Guide 564, 564-66 (1990) (noting that the goal of *Colorado River* is wise judicial administration); Michael T. Gibson, *Private Concurrent Litigation in Light of Younger, Pennzoil, and Colorado River*, 14 Okla. L. Rev. 185, 187-91 (1989).

In its analysis, the *Algernon-Blair, Inc.* court stated that this Court was so wary of approval of the practice of abstention for inappropriate grounds that it imposed severe restrictions on the discretion of the lower courts. *Algernon-Blair, Inc.*, 705 F. Supp. at 1521. Such a policy concern does not apply to declaratory judgment actions. In contrast, a district court's discretion over

declaratory judgment actions originates in Congress, which has authority to design such statutory relief. Congress gave the court discretion in determining whether to exercise its authority. *Id.*; 28 U.S.C. § 2201; Shapiro, *Jurisdiction and Discretion, supra,* at 548 n. 24.

Thus, the exceptional circumstances test does not apply to declaratory judgment actions, because the concerns that prompted articulation of the test (e.g., that the federal courts have a "virtually unflagging obligation to exercise the jurisdiction given them," *Colorado River*, 424 U.S. at 817), are irrelevant in an action for declaratory relief under 28 U.S.C. § 2201, where the court is under no compulsion to exercise its jurisdiction. *Terra Nova*, 887 F.2d at 1222.

B. Many of the sound policy reasons for allowing the district court broad discretion to defer to a similar state action are found in *Brillhart*.

This Court provided guidance for the exercise of discretion in declaratory judgment actions in *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491 (1942). Under *Brillhart*, a district court should not ordinarily exercise its discretion to hear a declaratory judgment action where there is another suit between the parties pending in state court that presents the same issues, not governed by federal law. *Id.* at 495.

The court's rationale in *Brillhart* had three principal bases: 1) avoidance of having federal courts needlessly determine issues of state law; 2) discouraging litigants from filing declaratory judgment actions as a means of forum shopping; 3) avoiding duplicative litigation. *Chamberlain v. Allstate Ins.*, 931 F.2d 1361, 1366-67 (9th Cir. 1991). The case now before this Court demonstrates the sound policy underlying the *Brillhart* rationale and the reasons the trial court should be allowed to exercise its discretion in determining whether to hear declaratory judgment actions.

1. Granting broad discretion to the trial court avoids having federal courts needlessly determine issues of state law.

Federal courts should not needlessly determine issues of state law. The state's interest in deciding questions of state law has jurisdictional roots in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Congress has expressly left insurance law to the states through the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-12 (1988).

This dispute is an insurance case governed by issues of state law. Granite State makes no claim that state remedies for resolution of the coverage issues are unavailable. Contrary to Granite State's assertions, the doctrine of *uberrimae fidei* does not charge the character of the dispute. (*See infra* § I.C.) As correctly noted by the Fifth Circuit, state law is probably applicable due to the nature of the issues involved.

Even if a ruling by the district court on the declaratory judgment action clarified rather than confused the legal relationships of the parties:

> [T]his clarification will come at the cost of "increas[ing] friction between our federal and state courts and improperly encroach[ing] upon state jurisdiction." The states regulate insurance companies for the protection of their residents, and state courts are best situated to identify and enforce the public policies that form the foundation of such regulation.

Allstate Ins. v. Mercier, 913 F.2d 273, 279 (6th Cir. 1990).

A system of judicial federalism has enough inherent friction with the state system without the added aggravation of unnecessary federal declarations. *See Mitcheson v. Harris*, 955 F.2d 235, 240 (4th Cir. 1992). As one court noted:

> To have sustained this suit for declaratory judgment would have been to drag this essentially local litigation

> into the federal courts and to defeat the jurisdiction of the state courts over it merely because one of the parties to the litigation happened to have indemnity insurance in a foreign insurance company.

Indemnity Ins. Co. v. Schriefer, 142 F.2d 851, 853 (4th Cir. 1944). Here, Tandy, a Texas-based corporation, through its Texas-based broker, A & A, acquired insurance with Granite State through its Texas based underwriters.

Absent a strong countervailing federal interest, the federal court should not elbow its way into this controversy to render what may be "uncertain and ephemeral" interpretation of state law. *Penhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 122 n. 32 (1984).

2. Granting broad discretion to the trial court discourages litigants from filing declaratory judgment actions as a means of forum shopping.

The second *Brillhart* policy is the interest in avoiding the use by litigants of declaratory judgments actions as a means of forum shopping. One court has described this factor as relating to "the 'defensive' or 'reactive' nature of federal declaratory judgment suit[s]," and stated that if a declaratory judgment suit is defensive or reactive, that would justify a court's decision not to exercise discretion. *Transamerica Occidental Life Ins. Co. v. Digregorio,* 811 F.2d 1249, 1254 n.4. (9th Cir. 1987).

This suit was an attempt to forum shop. Rather than respond to claims filed by insureds, insurance companies are frequently seeking declaratory relief in federal court. Out of fear of being held accountable in state litigation or to deprive the insured of its choice of forum, the insurer brings a declaratory judgment action in federal court against its insured to obtain a ruling on its obligations in relation to a parallel state court action. *See* Stanley T. Koenig, *Federal Court Stays and Dismissals in Deference to Duplicative State Court Litigation: The Impact of Moses*

H. Cone Memorial Hospital v. Mercury Construction, 46 Ohio St. L. J. 435, 437-39 (1985) (discussing a "reactive" suit as a type of duplicative litigation). In most cases, the insurer is unable to remove the state court action to federal court due to lack of complete diversity under 28 U.S.C. § 1441(b) (1973). Diversity usually would be defeated because of the presence of other parties in the state court action who are likely to be citizens of the same state. Such is the case here. Regardless of the need for these additional parties and the state law nature of these disputes, diversity jurisdiction is usually present in the suit for declaratory relief because the insurer and the insured are citizens of different states. *See Continental Cas. Co. v. Robsac Indus.,* 947 F.2d 1367, 1371 n. 4 (9th Cir. 1991).

This manipulation of diversity jurisdiction underlies insurance companies' strategy of bringing of declaratory judgment actions against their insureds to avoid being a defendant in non-removable state court actions presenting the same issues of state law. This practice is an archetype of what the 9th Circuit terms "reactive" litigation. *Digregorio,* 811 F.2d at 1254 n.4. Reactive litigation can occur in response to a claim an insurance carrier believes is not subject to coverage even though the claimant has not yet filed the state court action: the insurer may anticipate that its insured intends to file a non-removable state court action, and rush to file a federal action before the insured does so. *Continental Cas. Co.,* 947 F.2d at 1372.

Such a preemptive strike is exactly what Granite State attempted in this case. The trial court specifically found that by initiating what is here the first-filed suit, Granite State intended to forestall a foreseeable state court suit by Tandy. (Order at 10.) Granite State filed this declaratory judgment action in anticipation of an action it knew would be filed immediately after it gave notice to Tandy of its intent to deny coverage.

Even through Granite State filed suit in federal court before Tandy filed its state court action, it formed that intention because

it was aware of Tandy's claim and hoped to preempt any state court proceeding. Whether the federal declaratory judgment action regarding insurance coverage is filed first or second, it is reactive. *Continental Cas. Co.*, 947 F.2d at 1372-73.

Anticipatory suits are disfavored because they are an aspect of forum shopping. As the Seventh Circuit stated in *American Auto. Ins. Co. v. Freundt*, 103 F.2d 613 (7th Cir. 1939):

> The wholesome purposes of declaratory acts would be aborted by its use as an instrument of procedural fencing either to secure delay or choose a forum.

Id. at 617.

Permitting this declaratory judgment to proceed when there is a pending state court case presenting the identical issue would encourage forum shopping races to the courthouse. The consequences of Granite State's argument that a district court can not abstain if an insurance company decides to beat its insured to court would be virtually to license the preemptive strike by insurers so they can 1) fix venue they consider favorable or convenient to them and 2) avoid full adjudication of the insurance dispute by dictating who will be parties to the lawsuit. Furthermore, regardless of the degree of bad faith in which that declaratory judgment action is brought, the district court would have little or no discretion over whether to hear it.

3. Granting broad discretion to the trial court avoids duplicative litigation.

The next *Brillhart* policy favors dismissal of declaratory judgment actions in favor of resolving all litigation stemming from a single controversy in a single court system. Consideration of this issue favors the policy of avoiding duplicative litigation. To decide whether to entertain the declaratory judgment action, the federal court should analyze whether its resolution of the declaratory judgment action will settle all aspects of the legal controversy. As this Court wrote, for a federal court to charge headlong

into the middle of a controversy already the subject of state court litigation risks "[g]ratuitous interference with the orderly and comprehensive disposition of [the] state court litigation." *Brillhart*, 316 U.S. at 495.

There is no sense, as a matter of judicial economy, for a federal court to entertain a declaratory judgment action when the result would be to "try a controversy by piecemeal, or to try particular issues without settling the entire controversy." *Aetna Cas. & Sur. Co. v. Quarles*, 92 F.2d 321, 325 (4th Cir. 1937).

Here, the policy of avoiding duplicative litigation would be frustrated by permitting the federal action to go forward during the pendency of the state court action. *See* 17A WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4247 (2nd ed. 1988). Granite State can and has sought the same relief in the state action that it sought in the declaratory judgment action. The difference between the suits makes abstention even more compelling: there are additional parties whose claims can be resolved in the state action, that were not and could not be joined in the federal action. While Tandy cannot obtain full relief in the federal action, all of the issues presented by Granite State's declaratory judgment action can be resolved by the state court.

Tandy does not dispute the fact that the state court's suit will completely resolve the disputed coverage issues raised in the declaratory judgment suit. It will do that and much more. Indeed, the existence of an adequate alternative remedy, such as exists here, is a factor properly considered in any exercise of the district court's discretion. *See* 10A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2785 (2nd ed. 1983).

There is another policy basis favoring discretion by federal district courts that relates to the harm caused by piecemeal adjudication. In many declaratory judgment actions brought to resolve a duty to defend or indemnify an insured, there will be

overlapping issues of fact or law between the state and federal actions. If the federal court proceeds on the declaratory judgment action, the insured may be collaterally estopped from relitigating the overlapping issues decided in the federal action. *Mitcheson*, 955 F.2d at 239; Restatement (Second) of Judgments § 87 cmt. a (1982). Such issue preclusion would likely "frustrate the orderly progress" of state proceedings by leaving the state court with some aspects of the case closed from further examination but still other aspects in need of full scale resolution. *Phoenix Ins. Co. v. Harby Marina, Inc.*, 294 F. Supp. 663, 664 (N. D. Fla. 1969). Additionally, the state court will likely have to consult federal law to determine application of the preclusive principles. *See Harnett v. Billman*, 800 F.2d 1308, 1312-13 (4th Cir. 1986), *cert. denied*, 480 U.S. 9323 (1987). Thus, collateral estoppel principles, which Granite State admits will apply here (Pet. Brief at 32), will create further entanglement.

Rather than settling the issues presented in this litigation, ongoing parallel proceedings with the prospect of conflicting decisions are likely only to confuse matters, not resolve this dispute. The sound policy of avoiding piecemeal adjudication is especially strong here, where only the state court suit even offers the prospect of a full and complete adjudication.

C. *Uberrimae fidei* does not alter the character of this controversy.

Granite State seeks to bootstrap federal jurisdiction through its claim that the admiralty doctrine of *uberrimae fidei*, and thus federal law, applies. For two reasons, *uberrimae fidei* does not alter the character of these proceedings.

The first reason is that, even if the doctrine of *uberrimae fidei* is considered to be valid today, such a maritime doctrine is not applicable to this case because the subject matter of this dispute has no connection to maritime activities and does not fall within the court's admiralty jurisdiction. Second, because of the decreasing application of the doctrine in recent years, the doctrine of

uberrimae fidei is no longer recognized as entrenched federal precedent. As such, it should not be elevated above state law.

1. The disputed contract does not have the requisite "salty flavor" to invoke admiralty jurisdiction.

This dispute relates solely to the inland coverage provisions in an marine open cargo policy. Tandy's claim under the inland coverage provision of the policy is based upon damage to inventory at an inland warehouse/assembly plant that was caused by rioting workers. No maritime interests are implicated.

The "fundamental interest giving rise to maritime jurisdiction is 'the protection of maritime commerce.'" *Exxon Corp. v. Central Gulf Lines, Inc.*, 111 S. Ct. 2071, 2074-75 (1991). Additionally, admiralty is not concerned with the form of this action, but instead with the substance. *Id.* at 2076. If the subject matter of the suit is so attenuated from the business of maritime commerce that it does not implicate the concerns underlying admiralty jurisdiction, then admiralty jurisdiction does not encompass the claim. *See Atlantic Mut. v. Balfour MacLaine Int'l*, 968 F.2d 196, 199-200 (2nd Cir. 1992).

Tandy's claim relates solely to the inland or shore coverage provision in the maritime insurance policy and is so attenuated from the business of maritime commerce that it does not fall within the purposes underlying admiralty jurisdiction. Thus, admiralty principals, including *uberrimae fidei*, do not apply.

Even if maritime interests were implicated, application of the principles that govern "partially maritime" or "mixed contract" matters lead to the conclusion that this case does not fall within the federal court's admiralty jurisdiction. *See Kuehne & Nagle v. Geosource, Inc.*, 874 F.2d 283, 290 (5th Cir. 1989). Admiralty jurisdiction may be invoked only where a contract is "wholly maritime" or in the event an exception to this rule exists. None of the exceptions exist here. Therefore, because of the non-maritime obligation in the policy to provide inland coverage for

Tandy's inventory, the contract is not "wholly maritime." Instead, the insurance policy at issue is a "mixed contract."

When the maritime and the non-maritime obligations are separable, the court has admiralty jurisdiction only over the maritime aspects of the contract. *Balfour McClaine*, 968 F.2d at 199. The dispute in this case involves no maritime activities or obligations. This dispute, like the dispute in *Balfour McClaine*, involves only the non-maritime aspects of an marine open cargo policy.

Consequently, the dispute at issue does not have the requisite "salty flavor" of a maritime contract. *See Kossick v. United Fruit Co.*, 365 U.S. 731, 741 (1961). Granite State's claims that application of *uberrimae fidei* alters the character of this dispute are without merit.

2. The doctrine of *uberrimae fidei* is not elevated over state law.

Marine insurance contracts are governed by state law unless there is an established federal admiralty law that controls the disputed issue. *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 313-14 (1955). While the doctrine of *uberrimae fidei* still exists to some degree in federal maritime law, the doctrine is no longer recognized as entrenched federal precedence so as to elevate the doctrine over state law. *Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 882, 888 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 279 (1991). The *uberrimae fidei* doctrine's "spotty application in recent years — even in other circuits — suggests that the *uberrimae fidei* doctrine is entrenched no more." *Id.* at 889-90. The doctrine's applicability to marine insurance contracts has been increasingly reduced. Therefore, for this additional reason, the doctrine does not apply to the marine cargo insurance policy between Granite State Insurance Company and Tandy.

II. The *Colorado River* and *Moses H. Cone* factors themselves run substantially parallel to the criteria that have historically been deemed relevant to a court's determination of whether to accept or decline jurisdiction over a declaratory judgment action.

Even applying the factors set out in *Colorado River* and *Moses H. Cone*, the district court in these cases properly determined to refuse to exercise jurisdiction.

Under *Colorado River* and *Moses H. Cone*, this Court set out the following factors in determining whether to abstain from hearing a case due to the pendency of a similar state court action:

(1) the avoidance of exercise of jurisdiction over particular property by more than one court;

(2) the inconvenience of the federal forum;

(3) the desirability of avoiding piecemeal litigation;

(4) the order in which jurisdiction was obtained by the concurrent forums;

(5) the applicability of federal or state law to the merits of the claims at issue; and

(6) the adequacy of the state court proceedings to protect the rights of the party that invoked the federal court's jurisdiction.

Moses H. Cone, 460 U.S. at 15-16; *Colorado River*, 424 U.S. at 818-19. These factors themselves run "substantially parallel" to the criteria that historically have been deemed relevant in determining whether to accept or decline jurisdiction under the Declaratory Judgment Act. *Fuller Co. v. Ramon I. Gil, Inc.*, 782 F.2d 306, 309 n.3 (1st Cir. 1986).

The district court addressed these factors and to the extent they apply, they overwhelmingly support abstention. (Order at 8).

A. The first factor is irrelevant here. The second factor, inconvenience of the federal forum, supports the district court's decision to decline to hear the case. The district court explained its application of this factor as follows: "Even considered in the light most favorable to [Granite State], this court does not represent the most convenient forum for the parties." (Order at 8, 9). Indeed, the only entities located in the Southern District of Texas are Granite State's attorneys and adjusters.

All of the parties are incorporated and have their principal place of business in different locations — all distant from this forum. (Order at 8, 9). The district court noted:

> If, as [Granite State's] attorneys have suggested, the instant suit represents a "case between principals," then most of the witnesses germane to this dispute are located outside of this district. Likewise, most of the documentary evidence related to this dispute would be found not within this district but at the parties' corporate offices, which are located outside this district. Because at least one of the parties and numerous documents and witnesses relevant to this dispute are located in Tarrant County, the venue of the state court action would ameliorate the overall burdens of litigation on the instant parties.

(Order at 8, 9). This factor was never challenged and is binding on Granite State.

B. Perhaps more than any other, the factor concerning the danger of piecemeal litigation weighs in favor of abstention. (*See supra* § I.B.3). The avoidance of piecemeal litigation should be given great weight in declaratory judgment actions because such actions complicate and fragment the trial of cases and cause friction between state and federal courts. *Lumberman's Mut. Cas. v. Connecticut Bank & Trust,* 806 F.2d 411, 414 (2nd Cir. 1986). As the district court wrote, Tandy could conceivably proceed to trial on its claims against Granite State and thus force Granite State to litigate some, if not all, of its claims regarding coverage.

(Order at 9). The administration of justice would be better served if all the potential disputes resulting from Tandy's claim were resolved in one suit.

C. The fourth factor, the order in which jurisdiction was obtained by the concurrent forms, also favors abstention. The district court found that Granite State brought this suit to forestall a foreseeable state court suit by Tandy. (Order at 9, 10).

D. The additional factor of absence of progress in the federal litigation supports abstention. In the federal case, there had been virtually no progress. Tandy had not taken any action other than to file an answer, the motion for abstention, and related briefs, and Granite State has merely filed its complaint and response to the defendants' motion. (Order at 10).

E. Finally, the state court proceedings adequately protect Granite State's rights. The district court determined that:

> [Granite State] has not shown that it would be unable to pursue the claims that it presses in this Court in the Tarrant County proceeding.

(Order at 11). In fact, all relief Granite State seeks here is available in the state action.

Accordingly, even if *Colorado River* and *Moses H. Cone* apply, the district courts properly applied the factors for consideration of whether a federal court should abstain from hearing the case due to a pending state court action. The court's findings meet the bases set out in *Colorado River* and *Moses H. Cone* for abstention.

III. Under either a *de novo* or abuse of discretion standard, the district court's stay order was proper.

Granite State also complains of the failure of the Fifth Circuit to review the district court's decision to stay *de novo* rather than by an abuse of discretion standard. As applied to this case, which

standard applies is irrelevant. The stay order would have been upheld regardless of the standard of review used.

This is an insurance dispute governed by issues of state law. (Order at 4). In addition, Granite State was forum shopping when it filed the federal suit. It did not deny coverage until after it had filed the declaratory judgment action and, because of the tenor of the parties' relations during the investigation, there can be no dispute that Granite State expected Tandy to file suit if the claims were denied. Finally, the federal suit would be duplicative because it would not resolve disputes with other parties; while the state suit will resolve disputes with all the parties. Review of these factors by *de novo* review rather than by an abuse of discretion standard would not change the result.

Some circuits use *de novo* review rather than an absence of discretion standard. In spite of the different standards, there is no practical difference in the result. The fact that the other circuits, regardless of the standard applied, would have affirmed the stay order is demonstrated by Granite State's own authority.

Four of the five cases cited by Granite State that review abstention *de novo* in declaratory judgment actions (Pet. Brief at 25) support Tandy's position, because in them the court of appeals ordered abstention. *Continental Cas. Co. v. Robsac Indus.*, 947 F.2d 1367 (9th Cir. 1991); *Allstate Ins. v. Mercier*, 913 F.2d 273 (6th Cir. 1990); *International Harvestor Co. v. Deere & Co.*, 623 F.2d 1207 (7th Cir. 1980); *Hanes Corp. v. Millard*, 531 F.2d 585 (D.C. Cir. 1976). In each of these cases, the district court had actually assumed jurisdiction over the declaratory judgment, and the appellate court reversed the district court's refusal to abstain.

Only one of the cases relied upon by Granite State actually resulted in abstention. In that case, the determination that abstention was improper hinged on a factor not present here. In *Cincinnati Ins. Co. v. Holbrook*, 867 F.2d 1330, 1333 (11th Cir. 1989), state law provided no adequate remedy. State law would

not have allowed resolution of a declaratory judgment until the underlying claim had been resolved. Here, state law provides an adequate remedy.

Nonetheless, as a general principal, an abuse of discretion standard is appropriate for review of an district court's decision to abstain. *See infra at § I.*

Granite State's apparent contention is incorrect that an abuse of discretion standard permits district court's "unfettered discretion." (Pet. Brief at 28.) Broad discretion is not absolute discretion.

In *Brillhart*, this Court counseled district courts to:

> Ascertain whether the questions in controversy between the parties to the federal suit, and which are not foreclosed under the applicable substantive law, can better be settled in the proceeding in the state court . . . The federal court may have to consider whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding, whether necessary parties have been joined, whether such parties are amenable to process in that proceeding, etc.

Brillhart, 316 U.S. at 495.

Therefore, in the exercise of its discretion over the declaratory judgment action, the district court must balance concerns of judicial administration, comity and fairness. The court's decision on this balance is subject to review and that review should be under a standard of abuse of discretion, not unfettered discretion.

CONCLUSION

Tandy Corporation is entitled to have all disputes related to its insurance coverage and the losses it sustained in Korea determined in a single suit. The declaratory judgment suit brought by Granite State cannot provide that relief.

The district court recognized that the suit filed by Granite State is a preemptive, forum shopping action that Granite State now virtually admits it was. In exercising its discretion and in recognition that the state action brought by Tandy was, in fact, the proper forum in which all issues can be resolved, the district court properly stayed the action below in favor of the state action. In reviewing the action of the district court, regardless of the standard of review applied, the result is the same. The district court acted properly.

For these reasons, Tandy Corporation asks this Court to affirm the judgment of the Fifth Circuit and of the district court.

Respectfully submitted,

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